

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-2030

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
LYMAN T. SHEPARD,

Petitioner-Appellant,

-against-

LARRY TAYLOR, Warden,
Metropolitan Correctional Center,
and MAURICE SIGLER, Chairman,
United States Parole Commission,

Respondents-Appellees.
-----x

Docket No. 77-2030

Docket No. 77-2031

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM TWO ORDERS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
GORDON J. JOHNSON,

Of Counsel.



PAGINATION AS IN ORIGINAL COPY

DIST/OFFICE	YR.	NUMBER	MO. DAY YEAR	N/S	4	5	6	7	8	9	10	11	12
208-1	77	83	01 07 77	2	530	1							

PLAINTIFFS

DEFENDANTS

SHEPARD, LYMAN

TAYLOR, LARRY Warden
SIGLER, MAURICE, U.S.
Parole Comm.

A

1/25

CAUSE

28 U.S.C. sec 2241
PETITION FOR A WRIT OF HABEAS CORPUS

jhb

ATTORNEYS

FEDERAL DEFENDER SERVICE
RM 509
U.S. Court House
Foley Sq
N.Y.C. 10007

U.S. ATTORNEY
S.D.N.Y.

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☐ CHECK
HERE
IF CASE WAS
FILED IN
FORMA

DATE JAN 11 1977
FILING FEES PAID
RECEIPT NUMBER
C.D. NUMBER

STATISTICAL CARDS
CARD DATE MAILED
156

DATE

PROCEEDINGS

- 1-7-77 1 Filed petition for a writ of habeas corpus.
- 1-7-77 2 Filed ORDER TO SHOW CAUSE re: for a writ of H.C. & that petitioner be permitted to file his petition without payment of fees etc. ret. 1-10-77 in Rm 506 at 10:AM . Carter J.
- 1-7-77 3 Fld affdvt of Joan Gill of personal service of the Order to Show upon U.S. Attorney S.D.N.Y. by Pauline Troia.
- 01-10-77 4 Fld memo-end on entry # 2 re: on consent of parties the matter is referred to Judge Tenney. MacMahon J. (Pat One) m/n
- 1-19-77 5 Fld notice of motion by petitioner re: an order releasing petit. on bail pending determination of the writ. ret. 1/19/77
- 1-24-77 6 Fld memorandum Opinion # 45549 re: the petition for a writ of h,c. is denied as is the motion for bail pending determination of the petition. Tenney J. m/n
- 1-25-77 7 Fld notice of appeal by petitioner from the order entered 1/24/77 to the U.S.C.. Copy to all parties.

PLAINTIFFS

DEFENDANTS

SHEPARD, LYMAN T.

TAYLOR, LARRY, Warden Metropolitan
Correctional Center, and
SIGLER, MAURICE, Chairman United
States Parole Commission.

B

CAUSE

Writ of Habeas Corpus - 28 USC 2255

LS

ATTORNEYS

Legal Aid Society
Federal Defender Services Unit
Room 509 U.S. Courthouse
Foley Square, NYC 100

U.S. Atty.
SDNY

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID		STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD
	JAN 27 1977	141		DATE MAILED
				JS 5
				JS 6

DATE	NR.	Page #2	PROCEEDINGS	Judge Owen
1-27-77	1	Filed Petition for writ of Habeas Corpus.		
1-28-77	2	Filed order to show cause for writ of habeas corpus ret. 1-31-77 at 10:30AM. Pierce		
1-28-77	3	Filed notice of motion and affidavit for bail ret. sine die.		
1-28-77	4	Filed notice of appeal to the USCA form order of J. Pierce entered 1-27-77. m/n		
1-31-77	5	Filed order that petitioner be retained in custody of respondent until Feb. 4, 1977 unless extended by further order of this Court. Owen J.m/n		
2-3-77	6	Filed memo Petitioner's motion to be released on bail is denied, without prejudice to renew the application if warranted by future circumstances. So ordered Owen J. m/n		
2-7-77	7	Filed order to show cause to retain petitioner in MCC until Court determines writ of habeas corpus motion...Owen J.		
2-7-77	8	Filed affidavit in support of order to show cause!		
2-8-77	9	Filed memo of law in support of petition for WHC		
2-28-77		Filed memo end. on # 7 Petition having been dismissed in opinion dated 2-25-77....Order of 2-4-77 herin retaining petitioner at MCC is hereby vacated. Owen J. m/n		
3-1-77	10	Filed opinion # 45649 Pltff motion to dismiss a parole revocation warrant and to be released from custody to complete his term of parole is denied and petition for writ of habeas corpus is dismissed. So ordered Owen J.m/n		
3-2-77	11	Filed transcript of proceedings dated 3-31-77.		
3-2-77	12	Filed notice of appeal to the USCA form order of 2-25-77 of J. Owen J. m/n		
3-18-77	13	Filed True copy of U.S.C.A. stipulation motion dated Mar. 8, 1977 to consolidate the appeals in Docket No. 77-8043 and T-7143, and for a scheduling order for the consolidated appeal is hereby Granted. m/n		

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LYMAN T. SHEPARD,

Petitioner,

-against-

LARRY TAYLOR, Warden,
Metropolitan Correctional Center,
and MAURICE SIGLER, Chairman,
United States Parole Commission,

Respondents.

83
77 Civ. 88 (CHT)

4554.9

C

MEMORANDUM

APPEARANCES

For Petitioner: WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007

Of Counsel: PHYLIS SKLOOT BAMBERGER, ESQ.
GORDON JOHNSON, ESQ.

For Respondents: ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrews' Plaza
New York, New York 10007

Of Counsel: GARY G. COOPER, Assistant
United States Attorney

TENNEY, J.

The petitioner, Lyman T. Shepard, presently incarcerated
at the Metropolitan Correctional Center ("MCC") in New York City,

RE-MICROFILM

JAN 25 1977

JAN 24 4 35 PM '77
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

asks this Court to grant a writ of habeas corpus, contending that he has been denied due process of law in the revocation of his parole. He has also moved for bail pending determination of the petition. For the reasons stated below, the petition for a writ of habeas corpus is denied, as is the motion for bail.

The facts are as follows. After release on parole from a federal sentence, the petitioner was sentenced on December 17, 1974, following conviction of a New York state charge of attempted robbery. His request for an immediate federal parole revocation hearing was denied, and the United States Parole Commission ("Commission") filed a detainer against him in the form of a parole violation warrant based on his state conviction. On December 15, 1976, the petitioner was released from state imprisonment and held in the Schenectady County Jail pursuant to the federal detainer. He was transported to the MCC on December 30, 1976. A parole revocation hearing was scheduled for January 11, 1977. On January 5, 1977, the petitioner requested that the Regional Commissioner subpoena certain records and personnel from the New York state correctional facility where he had served his state sentence, claiming that such information was needed to properly present his case at the revocation hearing. The requests for the subpoenas were denied.

The parole revocation hearing took place as scheduled on January 11 before two hearing examiners. At the hearing,

family members testified about petitioner's prior family life and the maturity he had developed during the period of his incarceration. The Board also considered certain letters from the staff of the state facility and a letter from a private contractor affirming that he would offer petitioner a part-time job and a place to live upon his release. The record of the hearing also contains letters and a transcript from Clinton Community College, where the petitioner had excelled in his studies, compiling a straight A average, and where he intends to complete a degree program. Petitioner has been accepted for the Spring 1977 semester at the college and was given special permission for late registration until January 28, 1977. Classes at Clinton Community College begin this week.

After the hearing, the hearing examiners reached a determination that the petitioner's parole should be revoked but that he should be reparaoled on March 15, 1977, in advance of the suggested guidelines. In explanation of this decision, the examiners stated:

"Although these guidelines suggested that Mr. Sheppard be reparaoled after service of at least 18 months of imprisonment, because during the course of the robbery the firearm was discharged, we felt that a decision below that minimum was appropriate. Recognizing that he had served approximately 27 months on the New York sentence our reasons for departing from the range included the following facts: 1) No prior history of violence, 2) the accidental discharge of the weapon, 3) his outstanding record while incarcerated at Clinton and his solid release plans, and 4) the dual parole supervision by both New York and Federal authorities which would occur."

Affidavit of Hearing Examiner William Quirk,
sworn to January 18, 1977, at 2.

According to Commission procedure, the recommendations of the hearing examiners are reviewed by the Regional Office of the Commission, and unless action is initiated by the Regional Commissioner, those recommendations become an effective Commission decision. 28 C.F.R. § 2.23(d). A Regional Commissioner may also review the examiner's recommendations and refer those recommendations along with his own to the National Commissioners for consideration and action they deem appropriate. Id. § 2.24(a). Moreover, upon the motion of the Administrative Hearing Examiner, a Regional Commissioner may modify those recommendations of the hearing examiners that are outside the appropriate guideline range. Id. § 2.24(b). The full review process in this case is expected to run through mid-February.

The petitioner bases his application for a writ of habeas corpus on the Regional Commissioner's denial of the petitioner's request for subpoenas, contending that this refusal constitutes a denial of the due process of law required in parole revocation hearings. The testimony and documents requested concerned only the proper disposition of the case, the actual parole violation not being contested by the petitioner. Specifically, the petitioner requested that the Regional Commissioner subpoena the appearance of Mr. S. W. Haley ("Haley"), a Correctional Counselor at the state institution where the peti-

tioner was incarcerated, who would have testified to the petitioner's "adjustment to institution life, progress in rehabilitative programs, and psychological growth and change." Affidavit of Gordon J. Johnson, sworn to January 6, 1977, ¶ 8. The documents requested consisted of the state parole file and psychiatric reports prepared by a psychiatrist employed at the state facility which the petitioner believed would have demonstrated the same qualities as the requested testimony of Haley.

A parole revocation hearing consists of two parts: the finding of a violation and the determination whether the violation warrants returning the parolee to prison. As Judge Frankel stated in United States ex rel. Carson v. Taylor, 403 F. Supp. 747 (S.D.N.Y. 1975), "Due process must attend both stages of the inquiry." Id. In its landmark decision in Morrissey v. Brewer, 408 U.S. 471 (1972), the Supreme Court articulated the elements of due process required in a parole revocation hearing, one of which was the "opportunity to be heard in person and to present witnesses and documentary evidence." Id. at 489. The recently enacted Parole Commission and Reorganization Act, which codified the procedural guarantees announced in Morrissey, specifically provides that for purposes of the revocation hearing "the Commission may subpoena witnesses and evidence." 18 U.S.C.A. § 4214(a)(2) (Supp. June 1976). In explaining this section, the House Conference Report states,

"In exercising its discretion to issue a subpoena, the Commission shall take into consideration factors which include relevance of the testimony, or evidence sought, and whether or not such testimony or evidence is duplicative." House Conference Rep. No. 94-838 at 35, reprinted in [1976] U.S. Code Cong. and Ad. News 599.

In the recent case of Moody v. Daggett, 45 U.S.L.W. 4017 (U.S. Nov. 15, 1976), the Supreme Court emphasized the significance of the record of a parolee's intervening incarceration on the crime constituting the parole violation for the decision as to whether continued parole is justified. Id. at 4020. Nevertheless, the Court finds that the refusal of the Regional Commissioner to issue the requested subpoenas did not constitute a violation of due process under the circumstances of the instant proceeding. The information sought by way of subpoena was largely before the hearing examiners and relied on by them, and further documentation would have been "duplicative," in the words of the Conference Report.

The petitioner sought the testimony of Haley, his Correctional Counselor. The hearing examiners had before them, however, a letter from Haley dated October 14, 1976 which read in part:

"As in the past, resident Sheppard at this time maintains a record of excellent institutional adjustment. He currently occupies a clerical position in the Hospital Clinic, and is described as a responsible and efficient worker. Lyman has also attended our evening college program, and having completed two full semesters maintains a perfect grade point average of 4.0.

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"In the opinion of this writer, [the petitioner] has shown some significant personal growth while incarcerated and has learned to direct his energies toward his self-improvement program. Despite numerous obstacles, his overall attitude has been positive."

The explanation of the examiners for their decision, quoted above, would indicate that they credited Haley's letter and believed that the petitioner had an "understanding of and will to be incarcerated at Clinton." While the comments from the state institution might have strengthened or amplified this aspect of the petitioner's case, it cannot be said that their absence constituted a denial of due process where the examiners had before them clear and credible evidence supporting the contention which the petitioner wished to establish by the subpoenas.

This is not to say, however, that the Regional Commissioner's refusal to issue requested subpoenas could not, by itself, constitute a denial of due process in circumstances different from those of the instant case. The right of a parolee to "present witnesses and relevant evidence on his own behalf," 18 U.S.C.A. § 4211(a)(2)(C) (1966, June 1976), is established both by statute and by Supreme Court precedent and must not be thwarted by a refusal to use the Commission's subpoena power where that refusal would leave a parolee's contentions unsupported by relevant evidence at the revocation hearings.

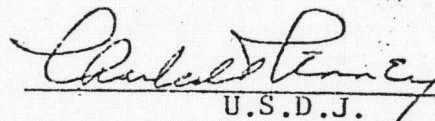
While this Court might well quarrel with the substance of the examiners' decision, the effect of which will be to pre-

vent the petitioner from attending the Spring 1977 semester at Clinton Community College, it cannot be said that the process by which this decision was reached deprived the petitioner of due process of law. Accordingly, the petition for a writ of habeas corpus is denied, and the motion for bail pending determination of the petition is likewise denied.

So ordered.

Dated: New York, New York

January 24, 1977


U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

D

-----X
LYMAN T. SHEPARD,

Petitioner, : 77 Civ. 387

-against-

LARRY TAYLOR, Warden, Metropolitan
Correctional Center, and MAURICE SIGLER,
Chairman, United States Parole Commis-
sion,

Respondents.

:
: MEMORANDUM
: AND ORDER

-----X
OWEN, District Judge

Plaintiff, in his habeas corpus petition, moves to dismiss a parole revocation warrant and to be released from custody to complete his term of parole.

The background is as follows: Plaintiff transported a stolen car interstate and was sentenced as a Youthful Offender. He was released after some 20 months, and 8 months later, while on parole, was convicted of attempted robbery, during which his gun was accidentally discharged. He served approximately two years in state custody therefor and was released to federal custody as a parole violator. Both the Hearing Examiners and the Regional Commissioner determined that for the parole violation petitioner should be reincarcerated for some further

period, although at each level it was determined that the total period should be less than that provided by the guidelines applicable to the offense committed while on parole. On each level, the petitioner's good adjustment record while in state custody was also one of several factors specifically considered.

It is claimed here that use by the Parole Commission of youthful offender guidelines as a factor was improper and illegal because allegedly in conflict with the concept and spirit of the Youth Corrections Act.

The authorities cited by the petitioner in support of this position* predate the March 1976 amendments to Chapter 311, providing for parole, and Chapter 401, providing for the correction of youthful offenders. Thus, Title 18, Sections 4206 and 5017, as so amended, are, in my judgment, dispositive here, mandating dismissal of the petition. Section 5017 provides that the release of a committed youthful offender shall be in accordance with the provisions of Section 4206. Said Section 4206 provides that in granting release, the Commission shall determine that

*

E.g., United States v. Norcome, 375 F.Supp.270 (D.D.C.), aff'd without opinion, 497 F.2d 686 (D.C. Cir. 1974).

the release would not deprecate the seriousness of the offense, nor promote disrespect for the law, would not jeopardize the public welfare, and that the release shall be "pursuant to guidelines promulgated by the Commission"

From the foregoing, it is clear that Congress has expressly authorized guidelines to be considered as a factor. They were considered in this case and were departed from downward to the petitioner's benefit. Petitioner urges that his good institutional adjustment while in state custody was not given appropriate, if not controlling weight. Both the Hearing Commissioners and the Regional Commissioner obviously gave favorable consideration to this factor. The exact weight placed upon it or the guidelines by these bodies, however, is not an appropriate subject for review by this court.

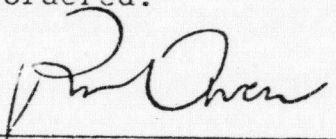
Since the essence of petitioner's argument is that the use of any guidelines which focus in some measure upon the severity of the offense are incompatible with the concept of focusing upon the offender himself, it is appropriate to note that whatever validity this argument might have had were the petitioner being considered for release on the original Youthful Offender Act commitment, it would seem that once he had been released and reincarcerated for

an armed robbery, the focus necessarily must shift from the youthfulness of the offender and his rehabilitative potential to other factors, including offense severity and jeopardy to the offender's welfare were there to be a second release upon parole.

For the foregoing reasons, the petition for a writ of habeas corpus is dismissed.

The foregoing is so ordered.

February 25, 1977.


United States District Judge

UNITED STATES GOVERNMENT

Memorandum

RECEIVED
DEC 13 12 12 PM '76

FJ - Nec. Action

TO : Joseph A. Nardoza, Commissioner
Northeast Region
U. S. Parole Commission

FROM : *[Signature]*
[Signature]
George J. Reed, Acting Vice Chairman
U. S. Parole Commission

DATE: December 10, 1976

SUBJECT: Sheppard, Lyman T.
Reg. No. 37289-115

Attached you will find the file on the above-named parolee who faces outstanding violator charges. It is referred to your office in order that he may be afforded as prompt a revocation hearing as possible at the New York Metropolitan Correction Center. An explanation of the events leading up to this situation follow.

A warrant for Mr. Sheppard's arrest as a parole violator was issued on January 9, 1975, by the Southeast Region. The charges included leaving the district of supervision as well as attempted robbery. Mr. Sheppard pleaded guilty to this latter offense and was sentenced to a term of four years imprisonment in the New York Correctional System on December 17, 1974. A detainer based on our warrant was subsequently lodged against him while the sentence was being served. New York State authorities have advised us that Mr. Sheppard will be released on parole from that sentence on December 15th, thus necessitating a revocation hearing.

While at the Clinton (N.Y.) Correctional Facility a suit was filed by Mr. Sheppard against the Commission's policy of maintaining detainers and providing revocation hearings after an intervening sentence has been served. Although the United States District Court ruled against him the Second Circuit Court of Appeals found our detainer review practices lacking and ordered additional due process protections. A copy of that opinion is in the file. This decision has been appealed and is currently pending in the Supreme Court. In light of our victory in Moody v. Daggett, U.S. (decided November 15, 1976) the outcome of this appeal appears favorable.

Because of this pending litigation the Solicitor General's office, and the fact that Mr. Sheppard is represented by counsel, has recommended that Mr. Sheppard receive his revocation hearing within the Second Circuit. The Bureau facility within that circuit which would enable the Commission to conduct as prompt



Lyman T. Sheppard, Reg. No. 37289-115

Page Two

a hearing as possible is the New York Metropolitan Correction Center. Mr. Tony Talek of the Bureau's designation office has indicated that they would designate the Center for the revocation hearing. The Southeast Region has already been advised of this.

It is my understanding that an examiner panel will conduct hearings in New York on January 11 through the 14th. Mr. Sheppard's case should be heard at that time. Prompt notification of his attorney, Mr. Gordon Johnson, regarding this scheduled hearing appears warranted.

In examining the file only one document, a letter from Probation Officer Falkenburg dated December 27, 1974, appears to reflect the facts of the attempted robbery. Since Mr. Sheppard is represented by counsel, it is advisable that copies of the New York Judgment and Commitment and any arrest records should be obtained for the examiners. I wish to also call to your attention the fact his counsel has already made a Privacy Act request and received most of the documents in the file. Any information used in the revocation proceedings, particularly documents not already provided, should be disclosed in accordance with 28 C.F.R. §2.50(e).

Please contact Fred Martin of the legal office if additional questions arise in this matter.

FM:mld

United States Department of Justice

United States Parole Commission

Washington, D.C. 20537

December 2, 1976

Gordon J. Johnson, Esquire
Legal Aid Society
15 Park Row 19th Floor
New York, New York 10038

RE: Shepard, Lyman T.
Reg. No. 37289-115

Dear Mr. Johnson:

This is in response to your letter of November 12, 1976, as well as Ms. Bamberger's earlier one in which you requested access to the above-named prisoner's file.

Inasmuch as it appears that Mr. Shepard will be released from New York state custody and receive a parole revocation hearing shortly, disclosure of relevant information that will be considered in determining whether his parole should be revoked will occur at that time. Your request has, therefore, been construed as a request for material in Shepard's file pursuant to 28 CFR §2.55(f).

You will find enclosed copies of the following documents

Hearing Summary	October 11, 1972
Order	November 12, 1972
Hearing Summary	June 19, 1973
Order	July 11, 1973
Phone Slip	November 11, 1973
Memo	November 7, 1973
Order	November 8, 1973
Application	November 21, 1973
Hearing Summary	December 11, 1973
Guideline Evaluation	undated
Order	December 27, 1973
Parole Plan	December 11, 1973
Request for Certificate	December 11, 1973
Certificate (2)	April 10, 1974
Warrant Application	January 9, 1975
Warrant	January 9, 1975
Instructions	January 9, 1975
Letter to Marshal	April 15, 1975



Letter to Ossining B	June 4, 1975
Letter from Ossining	June 12, 1976
Letter to Probation Officer	June 19, 1976
Response	June 20, 1975
Letter to Probation Officer	July 9, 1975
X Letter from Clinton with attachment	June 20, 1975
Letter to Clinton	July 24, 1975
Letter to Mr. Shepard	July 23, 1975
Letter from Probation Officer	July 31, 1975
X Letter from Clinton	August 6, 1975
Summary Review	August 13, 1975
Letter from Mr. Shepard with attachment	August 7, 1975
Letter to Clinton	August 14, 1975
Referrals (2)	January 7, 1976
	and March 15, 1976
Letter from U.S. Attorney	March 9, 1976
Note Response	March 11, 1976
	March 23, 1976
Letter to General Counsel (3)	March 24, 1976
Response	March 29, 1976
Court Order	January 14, 1976
X Letter from Clinton	June 25, 1976
Letter from Analyst (2)	August 16, 1976
Referral	August 16, 1976
Notice of Review with letter	August 20, 1976
X Letter from Clinton	October 14, 1976
Letter from Ms. Bamberger with attachment	October 20, 1976
Undated note	
Letter from Probation Officer	December 3, 1974
Letter from Probation Officer	December 23, 1974
Letter from Probation Officer (portion omitted)	December 27, 1974
Letter from Probation Officer	July 10, 1972
Regarding Bureau of Prisons documents in Mr. Shepard's file the following documents are included.	
Classification Study Material	August 24, 1972
Sentence Data Summary	August 3, 1972
Progress Report	May 18, 1973
Memo to Youth Division	May 21, 1973
Executive	

Sentence Data Summary	November 9, 1973
Progress Report	May 8, 1973
Transfer Order	August 31, 1973
Sentence Computation Record	August 1, 1972
Memo to Youth Division Executive	October 31, 1973
(portion deleted)	
Memo to Youth Division Executive	November 23, 1973
(portion deleted)	
Letter to Program Director	October 8, 1973
(portion deleted)	

Portions of certain documents were deleted as containing exempt material. The letter from Probation Officer Falhenburg dated December 24, 1974 was excised since it contained a psychiatric evaluation which, if released could lead to a serious disruption of institutional programs and be harmful to Mr. Shepard or others. In addition the material deleted from the three Bureau of Prisons documents was excised for the same reasons as stated above.

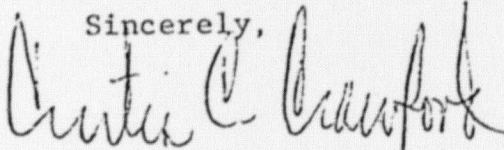
The Pre Sentence Report in Mr. Shepard's file dated June 22, 1972, has been withheld inasmuch as it remains a document of the Court which originally sentenced him. You may contact the United States District Court for the Western District of Texas at El Paso if you wish to have a copy of that document.

The United States Parole Commission has been deemed exempt from certain provisions of the Privacy Act of 1974 by the Attorney General. All material granted, excised from documents, or denied herein has been processed under the authority of the Alternate Means of Access which is part of said exemption. The exemption including the Alternate Means of Access is published in the Federal Register of August 27, 1975 (Vol. 40 No. 167, p. 39412) [28 C.F.R. §16.85].

You have thirty working days from receipt of this letter to appeal to the Deputy Attorney General from any denial

contained herein. Following his decision, you may seek judicial review.

Sincerely,



CURTIS C. CRAWFORD
Acting Chairman
United States Parole Commission

FM:cl

Enclosures

cc: Mitchell Dubick, Attorney
Special Litigation Section

Sarah Thomas
FOIA/Privacy Act, Office of
Management and Finance



E. S. Lefevre
J. EXXXXXXXX
SUPERINTENDENT

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
CLINTON CORRECTIONAL FACILITY

ANNEX

DANNEMORA, N. Y. 12929

October 14, 1976

Mr. Robert C. Princa, III
Case Analyst
Greenbriar Office Park
3500 Greenbriar Parkway S.W.
Suite 312
Atlanta, Georgia 30331

RE: SHEPPARD, Lyman
Our: # 74-A-3989
Your: Reg. No. 37289-115

Dear Sir:

This is in reply to your letter of September 20, 1976. As in the past, resident Sheppard at this time maintains a record of excellent institutional adjustment. He currently occupies a clerical position in the Hospital Clinic, and is described as a responsible and efficient worker. Lyman has also attended our evening college program, and having completed two full semesters maintains a perfect grade point average of 4.0.

In the opinion of this writer, Lyman has undergone significant personal growth while incarcerated and has learned to direct his energies toward viable self-improvement programs. Despite numerous obstacles, his overall attitude has been positive.

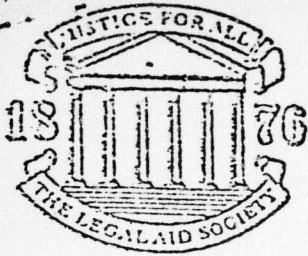
Resident Sheppard's sentence data is as follows:
Maximum Expiration Date: 10/17/78
Minimum Date: 11/76 Board
Conditional Release: 6/17/77

I hope this information will be helpful in your evaluation of Sheppard's Federal parole status.

Very truly yours,

S. W. Halay
Correction Counselor

SMH:kaj
cc: S.U. File



THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Parole Revocation Defense Unit
15 Park Row — 19th Floor
New York, N. Y. 10038
(212) 577-3500

WILLIAM E. HELLERSTEIN, Attorney-in-Charge
DONALD H. ZUCKERMAN, Assistant Attorney-in Charge

HAROLD H. HEALY, JR.
Chairman of the Board

ROBERT B. MCKAY
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Chief

December 30, 1976

The Honorable Harold R. Tyler, Jr.
Deputy Attorney General
of the United States
Attention: Freedom of Information
Appeals Unit
Department of Justice
Washington, D.C. 20530

Re: Shepard, Lyman T.
Reg. No. 37-289-115

Dear Deputy Attorney General Tyler:

This is an appeal from a denial of access to several of the documents requested in a letter dated November 12, 1976, pursuant to the Freedom of Information Act (5 U.S.C. 552). I refer specifically to the decision to excise the letter from Probation Officer Falkenburg dated December 24, 1974, and the material deleted from the three Bureau of Prisons documents. [See letter dated December 2, 1976, from Curtis C. Crawford, Acting Chairman, U.S. Parole Commission, a copy of which is annexed.] This letter was received by me on December 14, 1976.

The material deleted is not exempt. The release of psychiatric evaluations made over two years ago can hardly lead to a "serious disruption of institutional programs," especially since Mr. Shepard has been in custody of New York State authorities and not a participant in any federal institutional programs. Because of the passage of time, the release of the documents cannot be presumed to be harmful to Mr. Shepard or others.

Further, it is apparent from other documents provided that the conclusions apparently made by Mr. Falkenburg and the Bureau of Prison documents were revealed in other documents. See, e.g., the "Summary by Case Analyst" dated August 13, 1976, a copy of which is annexed. Thus, any privilege has been waived by the Parole Commission. Further, because the deleted material was used against Mr. Shepard in the Dispositional Review and will have a bearing and be used against him in pending parole revocation proceedings, he is entitled to the material as a matter of constitutional right pursuant to Morrissey v. Brewer,

-continued-

The purpose of the Society is to render legal aid in the City of New York to persons who are without adequate means to employ other counsel.—By-Laws of The Legal Aid Society.

408 U.S. 471 (1971) since all evidence must be disclosed to him. Moreover, since Parole Officer Falkenburg will be testifying at the upcoming revocation hearing and will be relying on these documents, Mr. Shepard should have been provided with the documents as a matter of due process of law. United States ex rel. Carson v. Taylor, ___ F. 2d ___ (2d Cir., July 22, 1976), slip op. at 5083-5089.

Section 552(a)(4)(B) of the Act clearly places the burden on the agency to sustain its action of denying a request for information pursuant to 5 U.S.C. 552(6)(3). The broad, general, and unspecific reasons for denial of the requested materials would hardly seem to meet that burden.

While it is my contention that the entire letter must be released, the Act does provide that some parts of the file are exempt from release "that reasonably segregable" portions shall be provided. At the very minimum these portions should be furnished to Mr. Shepard. No explanation has been provided for said failure.

Thanking you in advance for your prompt attention to this matter, I remain,

Sincerely,


Gordon J. Johnson
Staff Attorney

GJJ/fm

cc: Curtis C. Crawford
Acting Chairman
U.S. Parole Commission
United States Department of Justice
Washington, D.C. 20537

Michael Dubick, Esq.
U.S. Dept. of Justice
Special Litigation Section
Criminal Division
Washington D.C. 20530

Phyllis Bamberger
Legal Aid Society
Federal Defenders' Unit
Foley Square
New York, New York 10007

September 21, 1976

Mr. James Williams
Mr. Parole Officer
Box B
Bannockora, NY 12029

Dear Jim:

Mr. Lyman Shepard requested I submit a letter to you for inclusion in his file.

Lyman has been attending Clinton Community College since Fall 1975, and has done a most fabulous job as his curriculum average is 4.6. He has amassed a total of twenty-one credits and is enrolled this Fall in twelve credits of work.

Lyman would be an asset academically to any college campus. He is eager to learn and seems motivated to an end. As a student with Clinton, presently there is no problem in his acceptance for Spring 1977, if he were paroled.

As always, I only speak to you of Lyman's educational experience as I see it and cannot reflect on any other circumstances. Lyman has always been a gentlemen with a fine attitude. I feel he could do an excellent job if so motivated on any college campus.

Sincerely,

Fred Woodward
Coordinator
Inmate Higher Education
Program

FW/zp



Office of the
Vice-President

CLINTON COMMUNITY COLLEGE

P. O. Box 399, Plattsburgh, New York 12901

Telephone: 518-561-6650

July 22, 1976

Mr. Lyman Shepard
Dannemora
New York

Dear Mr. Shepard:

One of the pleasant tasks of a College Administrator is to convey congratulatory remarks to students who have distinguished themselves through high academic achievement. We do announce to you and to the community that you have earned an academic grade point average of 4.00 for the past semester and that you have been placed on the Dean's Honor List at Clinton Community College.

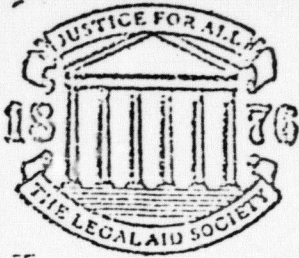
We congratulate you and wish you every success in the future.

Sincerely,

James D. Pletcher
Vice President for Academic Affairs

JDP/ar





THE LEGAL AID SOCIETY

Criminal Appeals Bureau
Parole Revocation Defense Unit

15 Park Row — 19th Floor
New York, N. Y. 10038
(212) 577-3500

WILLIAM E. HELLERSTEIN, Attorney-in-Charge
DONALD H. ZUCKERMAN, Assistant Attorney-in-Charge

HAROLD H. HEALY, JR.
Chairman of the Board

ROBERT B. MCKAY
President

ARCHIBALD R. MURRAY
Executive Director
& Attorney-in-Charge

January 5, 1977

K

Joseph Nardoza
Regional Commissioner
United States Parole Commission
Scott Building
Scott Plaza II
Industrial Highway
Tinicum Township
Philadelphia, Pa. 19113

JAN 6 3 02 PM '77
U.S. PAROLE
COMMISSION
PHILADELPHIA REGIONAL

RECEIVED

re: Shepard, Lyman T.
Reg. No. 37289-115

Dear Mr. Nardoza:

Pursuant to Regulation §2.51, I hereby request on behalf of parolee Lyman T. Shepard that subpoenas be issued requiring the personal appearance of S.W. Haley and the production of certain documents, to wit, the parole file of Mr. Shepard maintained and compiled by the New York State Board of Parole and New York State Department of Correctional Services, and all psychiatric reports prepared in 1976 by the psychiatrist or psychologist, one Dr. Reyes, at Clinton Correctional Facility Annex in Dannemora, New York, regarding Mr. Shepard, at the parole revocation proceeding scheduled for January 11, 1977, at the Metropolitan Correctional Center in New York City at 10:00 A.M..

Mr. Haley is a Correction Counselor at Clinton Correctional Facility Annex in Dannemora, New York. He was Mr. Shepard's counselor during the period of his incarceration, and upon information and belief, has information concerning Mr. Shepard's adjustment to institutional life, progress in programs, and rehabilitation. He has advised me that he will not attend the revocation hearing voluntarily. Because of the nature and complexity of his anticipated testimony, an adequate written summary cannot be prepared. Moreover, pursuant to Morrissey v. Brewer, 408 U.S. 471 (1971), Mr. Shepard is entitled to present witnesses at the hearing, and where, as here, the relevancy of their testimony is not in doubt, the Parole Commission must issue subpoenas for their appearances as matter of due process of law.

January 5, 1977

The requested documents are also relevant to the proper disposition of Mr. Shepard's case because, on information and belief, they pertain to his institutional progress, adjustment, and rehabilitation while incarcerated at Clinton Correctional Facility during the last two years. Again, Mr. Shepard is entitled to the documents as a matter of due process of law. Morrissey v. Brewer, supra. New York State will not release their documents voluntarily.

I trust that I will receive a prompt response to this demand. Please feel free to call me at 212-577-3500, or if I am not available, please call Ms. Phylis Bamberger, 212-RE2-2971.

Sincerely,

Gordon J. Johnson
Staff Attorney
Attorney for Parolee Shepard

GJJ/fm

cc: Fred Martin, Esq.
United States Parole Commission
320 First Street N.W.
Washington, D.C. 20537

David E. O'Connor
Post Release Analyst

Mitchell B. Dubick, Attorney
Special Litigation Section
Criminal Division
United States Department of Justice
Washington, D.C. 20530

Lyman Shepard
Metropolitan Correctional Center
150 Park Row
New York, New York

Phylis Bamberger
Legal Aid Society
Federal Defenders' Unit
U.S. Courthouse Rm. 509
Foley Square
New York, New York 10007

UNITED STATES GOVERNMENT

Memorandum

Mr. Nardoza, Regional Commissioner

DATE: 1/10/77

THRU: Mr. Johnston, Administrative Hearing Examiner

FROM: Mr. O'Connor, Post Release Analyst

RE: SHEPPARD, Lynette

Reg. No. 87289-115

SUBJECT: REC: DENY REQUEST FOR SUBPOENA

Δ is a YCA Case w/ a FTD of 4-9-75 on NYMVA. Institutional Rev. Hearing set for 1-5-77. Δ's attorney called to request subpoena for Δ's State of N.Y. Parole & Institution files, and the presence of Δ's caseworker at State Facility Δ is being released from other conviction for Attempted Robbery.

- 1) Progress Report from Superintendent dated 8-6-75.
- 2) Letter from Δ dated 8-7-75.
- 3) N.Y. State Parole Office's Williams letter dated 6-25-76.
- 4) Correction Commissioner Haley's Prog. Report dated 10-14-76. (Δ's account).
- 5) Clinton Comm. College Officials letter dated 7-22-76.
- 6) Institution Educ. Board's letter of 9-21-76.
- 7) NYC Probation Office Re-Sentence Report dated 10-21-76.

According to our procedures, witnesses should then, advantageously, may be requested to appear & a subpoena issued if the witnesses testimony is necessary for proper disposition, or will not appear voluntarily or provide a written statement. There is no mention of a subpoena in our records.

I suggest a subpoena is not appropriate in this situation.

FCJ:

JAN:

Agree: FCJ 1/10/77

Agree: Jan 1/10/77

Disagree: _____

Disagree: _____

Discuss: _____

Discuss: _____



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan



United States Department of Justice

United States Board of Parole

Scott Bldg. Scott Plaza II
Industrial Highway, Tinicum Township
Philadelphia, Pennsylvania 19113

January 10, 1977

Gordon J. Johnson, Esquire
Staff Attorney
The Legal Aid Society
Criminal Appeals Bureau
Parole Revocation Defense Unit
15 Park Row - 19th Floor
New York, New York 10038

Re: SHEPPARD, Lyman Thurkle
Reg. No. 37280-115

Dear Mr. Johnson:

This is in response to your letter dated January 5, 1977, requesting that the Commission issue a subpoena for Mr. S. W. Haley to testify and bring documents relating to the case of the above-named parolee at his revocation hearing scheduled for January 11, 1977, at the Metropolitan Correctional Center, New York, New York. Your letter was brought, as soon as possible, to the attention of Mr. Joseph Nardoza, the Regional Commissioner who has the sole authority to issue a subpoena. As you are aware, notice of this hearing was mailed to you on December 14, 1976, and the Commission did not receive your request until January 6, 1977. Mr. Nardoza was attending a conference in Washington, D.C., from January 5th through the 7th, 1977, and, therefore, was not able to respond to your request immediately.

Upon review of your request, Mr. Nardoza does not believe that the subpoena of Mr. Haley and the records is necessary for the proper consideration of Mr. Sheppard's case. This conclusion was based on several factors. To begin with, the Commission already has a total of six letters from Haley, Mr. Sheppard, and you documenting Mr. Sheppard's institutional performance at the Clinton Correctional Complex, which will be considered by the Examiners at the hearing. I would note that written reports similar to those received in Mr. Sheppard's case are traditionally considered by the Commission in determining a prisoner's program performance and adjustment. Moreover, the question of institutional performance or participation in rehabilitative programs is only one of many factors that are considered to determine whether revocation is warranted.



Your request for a subpoena under 28 C.F.R. Section 2.51(a2), while indicating that Mr. Haley would not voluntarily appear, did not set forth a factual basis as to why an adequate written statement from Mr. Haley in lieu of his appearance could not be obtained, but, rather, merely concluded that, "The nature and complexity of his anticipated testimony" required his personal appearance. In our view, this approach would require that witnesses and documents be subpoenaed in virtually every case where an alleged violator serves a term of imprisonment in another state or federal facility prior to his revocation hearing. As stated above, the normal procedure for determining institutional performance is to review written progress reports.

In closing, I would like to advise you that the Commission will receive any information from Mr. Sheppard or others at the revocation hearing regarding his institutional performance, as well as any additional letters, affidavits, or other documents or evidence relating to that or any other facet of Mr. Sheppard's case.

Sincerely,

David E. O'Connor
Post Release Analyst

N

Hearing Examiner -- Quirk ("Q")
Van Waldraven ("VW")

Lyman Shepard -- ("LS")

Gordon Johnson -- ("GJ")

Q All right, sir. You are Lyman Shepard?

LS Yes.

Q All right, Mr. Shepard. My name is Quirk. This is Ms. Van Waldraven. We are examiners with the Parole Commission and our purpose here today in your situation, Mr. Shepard is to inquire into the alleged violation of your parole. You were notified that the case would be heard at this time...I know that you have petitioned the Court for representation. I believe Mr. Johnson how is here in response to that petition. Is that right?

Yes.

Q Mr. Johnson, for the record will you give us your full name and your affiliation with [] and your address with zip code, and your telephone number with area code.

GJ Gordon J. Johnson. Gordon J. Johnson, The Legal Aid Society, Parole Revocation Defense Unit...The Legal Aid Society, Federal Defender Unit, 15 Park Row, New York, New York 10038. My telephone number is area code 212 577-3500.

Q All right, sir, thank you. Mr. Shepard, in accordance with our procedures I want you to go over what we call a check-list of procedures and legal rights to make sure that we are in proper [] at this point. I would ask you to be certain of little items after [] either yes or no. You have received notice of the hearing [].

LS Yes.

Q You have been advised of your right to counsel.

LS Yes.

Q And you have voluntary witnesses.

LS Yes.

Q I see. You have, I believe completed the form I-16 in which you asked for appointment of counsel and Mr. Johnson, as I say, has been appointed by the court for that purpose. Is that correct, sir?

LS Well, I [] the form,
yes?

Q Have you been advised of the charges, in other words, have you received a copy of what we call a form H-20, the Warrant Application [] Statement.

LS Yes.

Q Are you now familiar with those charges.

LS Yes.

Q Do you believe that you've had sufficient time to prepare your case and confer with your attorney on the charges.

[Pause] [Telephone ring]

Q The question was have you, do you believe you had sufficient time to prepare yourself?

LS I had wanted to subpoena witnesses and have not been able to do that. However, I feel that I might suffer irreparable damage to my cause if we don't proceed with the hearing.

Q Well, sir let me put it this way. At this point, are you, have you decided, are you agreeable to proceed at this point?

LS Yes, sir.

Q All right. You do have a right to give your explanation of the charges [] have overlooked thus far ..and we'll get into the charges. And I would explain just a little bit further how we do that as far as procedure is concerned. We say that Mr. Johnson is here to represent you, and we will direct our questions to you. We would ask that you [] at any time. Feel free to confer with your attorney or ask him any questions or any other advice that you need. The hearing that we conduct, we try to keep as informal as possible. We are not a court of law, and we are not here to litigate issues of law in that sense...We are just here for the purpose to decide whether there has been a violation of your parole. If there...in the event that we do find that you violated parole, of course this is a decision to be made. It is a tentative decision. There would be then a follow-up decision as to what to do with the crime that you were in violation of. Whatever decisions we give you are tentative. They don't become final until you receive them in writing. That comes within twenty-one days from the Regional Office. You do have a right to appeal those decisions. At the time you get the decisions back you will have the necessary information as to how to appeal. If you need any further information you can talk to the staff here on the technicalities of paper work and things of that nature, all right?

LS []

Q All right, Mr. Shepard, just to bring us up a little bit to date correct me if I'm wrong because I've been working from file that is rather old. You were recently sentenced to YCA [] in July of 1972, right?

LS Yes.

Q In Texas.

LS Yes.

Q I believe you were originally confined to [].

LS Yes.

Q You were however, when you were released on parole released on Tallahassee so you must have transferred there in the mean time.

LS Yes, sir. That's the [].

Q I see. The record would indicate that initially at your initial parole hearing you were set off for approximately eight months and that at that time in July 1972 you did receive a [] for a halfway house.

LS Yes, sir.

Q This did not work out so that was rescinded and you continued for a hearing on the next docket in November, but in December you [] the parole that was effective on April the 18th.

LS Yes.

Q 1974, [], right?

LS Yes.

Q The record indicates that the allegation is that you violated parole on or about the 18th of October 1974. Now a warrant was issued on January 9, 1975, and again the record will indicate that this was placed as a detainer because you had been sentenced to a term in the state. [] right?

LS Yes.

Q And following that chronologically then you were paroled from the state sentence on the 15th of December 1976. Taken into custody by the United States Marshall. Held in the Schenectady County jail. And brought back here on or about the 30th of December.. At that time you would have had some 1469 days remaining to be served [] full term date. [] is set at April 9, 1978.

LS Well, that's...I don't believe that I have 1400 days?

Q []; well, at the time you wouldn't have. At the time you came out...[].

LS No, sir. I think the time I came to the state I was only [] approximately 16 months.

Q No, I was talking about the time you were released on federal parole; but that's really academic because your time has been running anyhow. So for custody purposes, you've been in federal custody on this warrant for about a month. From the 15th to about the 11th.

LS Yes.

Q All right, sir. Now what I'd like to do is go through the charges, there are two...

GJ Mr. Quirk, if I may interrupt for just a moment, there were some complications that we had prior to the beginning of this hearing that I think should be reflected in the record.

Q Go ahead, Mr. Johnson.

GJ One, we had brought a court reporter from the Southern District of New York and asked that he be permitted to make a stenographic recording of this proceeding. In our conversation prior to the beginning of this hearing, I was informed that that would not be allowed in accordance with manual rules, I believe.

Q Procedural rules.

GJ Procedural rules of the commissioner. I would again formally make that request. Mr. Shepard has pending in the Southern District of New York a writ of habeas corpus that ... dealing with the issue of whether or not he has been denied rights with regard to subpoenaing of certain witnesses at this hearing and [] that this hearing is the result relevant [] that proceeding. The provision of the transcript from the tape has been my experience and my office's experience, taken a long period of time. And as Judge Frankel pointed out in his recent opinion, it is very often indecipherable and unintelligible, and for that reason I would renew my request to have the court reporter allowed in here today.

Q Mr. Johnson, we have indicated we have decided in consultation, even after our conversation [] not to permit that under our rules, but your objection has been noted here, I will call for this be the only official recording of the hearing and of course as you know you are entitled to apply to the Region for a copy of the transcript at any time.

VW []

Q Well, the recording of the hearing.

GJ The second thing was that Mr. Shepard has been working not only with me [] but Phylis Bamberger of the Federal Defenders Unit of the Legal Aid Society, and in fact Ms. Bamberger has represented Mr. Shepard in court proceedings regarding revocation of parole. We have worked together in this matter and I requested that Mrs. Bamberger be allowed to assist me hearing proceeding although she will not participate in the proceeding I asked that she be allowed to be present during the proceeding so that I might, if necessary, consult with her.

Q And again, Mr. Johnson, as we had discussed, our procedures really do not either permit or deny that sort of a thing. It is our judgment however, that the limitations faced and the fact that you yourself are well aware of the case and that we would prefer to keep it as simple as possible and keep the room clear as possible. Now let me ask you in this connection, do you Mr. Shepard...the point that Mr. Johnson has raised is really not in the alternate, but would you rather have one or the other defend you at this point, at which time this could be considered, or whether Mr. Johnson who is here now is agreeable to...

LS [] only one, Mr. Johnson is []

Q All right, thank you. Your request is noted, and the answer to it also noted, Mr. Johnson. Do you have any other points at this time that you want to put on the record?

GJ I think the third point which we would like to place on the record is that we made request to the Regional Commissioner for subpoenas to be issued to require the appearance of S.W. Haley, Mr. Shepard's educational and prison counselor from Clinton Correctional facility at Dannemora, New York, and also requesting the productions for hearings and arguments of Mr. Shepard's prison record from Clinton. I would note as the record already has made clear, Mr. Shepard has been incarcerated for the past two years at Clinton Correctional Facility Annex in Dannemora, New York. While there, he has undergone significant and I think relevant rehabilitation participation in college and rehabilitation programs. Mr. Haley was his counselor and has a personal knowledge of Mr. Shepard's progress, and changes and rehabilitation while in that institution. And it is my belief that the [] with Mr. Haley and Mr. Shepard presence at this hearing is proper and essential to a fair disposition of the proceeding here today. I would also note that I believe it's a matter of constitutional right in the cases Morrissey v. Brewer and Moody v. Daggett, the presence of those records and of Mr. Haley is constitutionally required, although we have been denied that, and...

Q It's denied by the Regional Commissioner, Mr. Johnson.

GJ Yes.

Q Again, sir, would you feel that Mr. Haley's presence at some time with or without the subpoena, if you will, and these records, are so germane that you are considering, or would consider, asking for a postponement in this case until you could produce Mr. Haley or other witnesses or something else that we could discuss?

GJ Well, the position that we're in is that Mr. Shepard was paroled because on one of the factors in his early parole from New York state was his participation in his New York state parole program, which involves attending Clinton Community College in Plattsburg, New York, and the guarantee of part-time employment in Plattsburg to support him while he is attending college. Any delay in this hearing would seriously prejudice his ability to participate in those programs. And for that reason, we feel compelled to proceed, because of the harm that may befall Mr. Shepard if this proceeding is adjourned.

Q Now, is that[unintelligible], Mr. Shepard, that again, going back to the question, that you want to proceed at this point with whatever information that we have or that you have and whatever is on the record?

LS Yes, sir, I do, because it seems that the reason [] denied subpoenas, and I don't see where a postponement would necessarily insure that they would do so in the future, and [].

Q Fine, Mr. Shepard, then if it is agreeable, we will proceed now. I am looking at the warrant application. What I am supposed to do, again according to our procedures, I am going to read these charges just as they appear on the warrant application. I'll read them to you singly. I'll ask you after each one if you admit or deny, and we'll go back and we'll tell you what information we have, and we want what information you have [] and we'll go from there as far as establishing violation or not. It does indicate, and it's from the warrant application, and I note that you argue [] copy, I do not see that you have one before you now, perhaps [].

LS I'm familiar with it...but I didn't bring my copy.

Q Oh, is that right?

VW Did you want my copy?

Q I would read this to you, and again the statement from the warrant application dated January 9, 1975, the charges are two, number one was leaving the district without permission. The indication is that on or about October 18, 1974, you [] supervision in the middle district of Florida. According to the information that Mr. [] here sent to Mr. [] here in New York dated September 2, 1974 the allegation being, Mr. Shepard that you left the district without permission. Do you admit or deny that?

LS Yes, that is true.

Q I see...Number two is attempted robbery []... second degree. It states that on December 19, 1974, you were sentenced to four years in custody in New York Department of Correctional Services upon your pleading guilty to the charges of attempted robbery in the second degree. They go on further to say that on October 18, 1974 you attempted to rob a Burger King

Q(con)

[] restaurant in Manhattan, New York and on October 18, 1974 in the Superior Court for New York county pled guilty to this offense. And this information being sent on to the commission [] letter dated December 27, 1974. Again, the question is whether you admit or deny the act of attempted robbery in the second degree.

LS No, I do not deny that. That is true.

C []...All right. Now you'll note that number one, leaving the district without permission referred to Mr. [] letter. Mr. [], the letter that we have written to Mr. [] stated that your mother told Mr. [] that you were being held in the House of Detention in New York City [] armed robbery. That you [] before a state court on November 27, 1974, entered a plea of guilty with sentencing being set for December 17, 1974. You allegedly robbed a Burger King restaurant and subsequently were arrested by the New York city police department. Among other things, in the last paragraph we find [] from the middle district of Florida, since he did not have permission to travel outside the middle district of Florida. Which was an indication as it looks on the face of it [] Mr. [] was not aware of the fact that you had left the middle district of Florida, and so your mother advised him that you were in New York. Now this is what we have on that, what would you like to tell us on that, Mr. Shepard?

GJ If I may interrupt at this moment, I would request to see the letter from Mr. [], please.

Q Yes.

GJ Thank you.

Q I think what the letter was indicating, he is saying on or about October 18, 1974 you left presumably because it was on October 18, 1974 that you were arrested in New York. I guess...

LS []

Q Well, we'd like to know a little bit about that Mr. Shepard. If you could tell us when you left and why you left and where you were and []

LS I don't know. I left fairly involved trying to explain why I left. I can't say that it will be excusable. But, [].

Q Were you living with your mother?

LS No, I was living by myself.

Q Where exactly were you living?

LS I was living on St. [] Street, in a house that I

LS (con)
renting.

Q St. Petersburg.

LS Yes. And moved [] because a regrettable incident had occurred in which my house was destroyed by somebody that went temporarily berserk or something, and subsequently was arrested and jailed for it. But made my living place uninhabitable. And I rented this time which was something that was very difficult. I managed to find this house in St. Petersburg. I more or less wanted to move away from the area I was in Tampa anyway because of the high, the presence of drugs and people using drugs especially young people and stuff like that, who [] just plain using drugs were irrational in other ways, irresponsible in other ways. So I managed to rent the house on [] Street, which was outside of Tampa, before I moved into this house and before I paid rent on it I went to my parole officer in Tampa explaining the circumstances that my house was destroyed. I came in from work one night and it was just wrecked, it couldn't even be slept in that night.

Q Was that Mr. []?

LS That was not Mr. [], I can not remember the name of my parole officer in Tampa, my original parole officer. He informed me that in order for me to move to St. Pete that I would have to change parole officers. Which was something I didn't want to do. Since I got along well with my parole officer there... But I had to move and I had found a good place to move, with fairly low rent at the time it was hard to find any place [] in the middle of the worst part of what they call the recession... This place I could rent for \$125 a month.

Q Is St. Pete outside the district of Tampa [].

LS No, it's in the same district, it's in the middle district but it's a different city.

Q Different, is it different office public?

LS It's a different [].

Q Who was your parole officer there, what was his name?

LS In Tampa or []?

Q Well, the one that you talked about that said that you'd have to transfer

LS He told me I'd have to transfer. I don't remember his name. He told me I'd have to transfer parole officers. And he said that he'd have to get this move approved through my new parole officer as well.

Q When did this actually happen, when your house was destroyed and..and you contracted the other house?

LS This happened probably in July

Q Some about three months after...

LS []

Q Did your parole officer in Tampa give you any idea that he would not approve it other than just that he would have to see it it could be transferred by being contacted

LS Yes, sir, he said what was necessary was approval not only from him, he said it was alright with him, but he would need approval for the location from my new parole officer which would be assigned to me and I waited for this and received notification from him that the new address was approved by my new parole officer. I never saw him, my new parole officer at this point. I moved out there. The first time I saw my new parole officer was, who was Mr. []...was when he came out to my house one day where I was living. This time he seemed very upset on first coming out there for some reason. I could not understand why. It was the first time he'd met me.

Q Was it you got word that your transfer had been approved?

LS Yes.

Q And the first time you saw Mr. [] was when he came out to the house [] on the basis of the approval

LS He was very upset

Q Did he say why?

LS I couldn't understand. At first eventually he said he was upset with where I was []. He told me that [] was a street just up a few blocks from where I was that was considered a very hot drug spot. I told him that I had just moved out of what to my observation was an area which I wanted to move away from because of the presence of drugs and people taking drugs and the type of precariousness that brought to my situation or might tend to bring to my situation. I said although that area you speak of might have been listed as a "hot spot", my observations to date have shown me that it must've cooled off, and I'm not inclined to be involved in that anyway.

Q Did he [] or something?

LS No. I was working. I had had jobs with the cab company in Tampa. I had no transportation at the time, and I attempted to get a job with the cab company down in []. The cabcompany was willing to hire me. When it came to getting the papers it turned out that the city council had a law on the

LS (con) books that prevented me from driving a cab as an ex-convict. The owner of the cab company to which I went, the Diamond Cab Company, said that we could go to the city council and have the law changed. But meanwhile, I couldn't drive a cab, but he still had work for me. He had yard work and stuff like this that I could do in the meanwhile. My main objective was to get in school, to get in college, which eventually failed because there were several obstacles in my situation. I had some work, I did not have full employment right at that time. I was involved with the city council. They had agreed to change the []. As soon as they went through the technicality of changing the ordinance, I could get a license to drive a cab and I would have a full-time job right there near my residence, and hopefully at that time I still hoped to get registered in college.

Q When then did you actually leave that district, Mr. Shepard. Was it shortly after you talked to [].

Well, it was the second [], the first [] he issued an ultimatum. He gave me, some actually, for me impossible ultimatum. One, was find a new place to live. By the weekend, I believe he saw me on a Thursday, which gave me one day to have a new place to live. Also, to have a job. I was in this part-time employment that I had which was also a difficult thing to do especially at that period. I just couldn't seem to talk to the man at all. When he left, I felt entirely frustrated, I felt there was no hope that I could meet these ultimatums. So I stayed right where I was, and continued to try and pursue the job opportunity that I was trying to set and trying at the same time to get into college. He came out a few weeks later, in which time I'd gone before the council, and they'd agreed to change the law and surprisingly this time I'd expected it to be revoked before then simply because I didn't comply with his ultimatum. He came out to my house and this time it was completely the opposite. He was completely the opposite from the way he was before. He asked, actually asked me questions and was responsive and at least open to answers.

Q I see. Now, to move this thing along...something happened that made you leave.

LS Yes, sir. Combination of frustration. By that time I was not able to get in school, I didn't have transportation to get to school, the job still hadn't been changed and I wasn't making enough. My parole plan, my desire for parole plan had been to enroll in college and my B.A. title would help me [] and that way I could spend most of my time [] at part-time jobs and have enough to pay the rent, buy food and stuff like this. And have transportation. Get a little progress. That didn't work out. All I can say is...

Q When did you leave actually?

LS I left around the beginning of October, the first part.

Q And did you come directly to New York?

LS Yes, sir.

Q Did you have some plan...

LS I may have stopped along the way, I was fairly irrational what I did... again it's hard to explain [] other than just to say that I was [] and stability.

Q Well, when you went to St. Pete, you had some idea. You rented the place, now when you left St. Pete to come to New York, you had some place to go or...?

LS I was just leaving...I was just leaving, I did not intend to come to New York.

Q You didn't think about going back to Tampa either.

LS No, I didn't think about going back to Tampa. I did eventually, when I thought about going to New York, I thought coming back to Tampa. I stopped at a friend of the family's house [] and these people weren't acquainted with my situation. I told them at the time all I had was a car and I was out of money. I told them that [] I thought of looking for a job in Mobile and []. It evolved that this friend of my parents', I believe, had a little recording studio of his own, and he recorded his own music, wrote his own songs and everything like this. I had worked previously [] down in Miami, and I knew that my sister was here in New York in business with a production company [] have these tapes that so impress me [] songs and lyrics. I felt something could be done with so at this time I decided to [] a letter [] and take the tapes to New York. [] come here to my sister in New York...[]

[] and hair-brained as it was, that's what I did. I came up here to New York with this tape hoping to possibly get something working with good luck, which I was foolish enough to look for, unbelievable luck actually, I hoped to maybe get something arranged so that I could go back down to Florida before a monthly report was due or something and have something working on a business line that would give me a better financial basis to help me out of my troubles which I was having at the time. That was the idea behind it.

Q Did you actually come to your sister's house?

LS Yes.

Q Does she live here in Manhattan?

LS Yes, sir.

Q That would be somewhere I suppose in the 14th and thereafter in October.

LS It was probably a week, close to a week from the time that I left Tampa till I got up here.

Q Now does that lead us into number two, Mr. Shepard? It looks like you were arrested on October 18. The record we have says you were arrested on October 18, 1974.

LS I think it was []...I'm not sure.

Q Yes, the information that we've gotten is that you attempted to hold up the Burger King on Eighth Avenue here, and that you had a gun in your possession.

LS Yes.

Q And there was a detective in the Burger King at the same time noticed what you were doing and trying to subdue you, the gun went off...

LS Yes.

Q Apparently nobody got hurt.

LS No.

Q You want to tell us a little bit now about what happened on this? We're at the point now where this looks like it might have been a few days after you arrived here...

LS Well, I got here and like I said, this was a period when everybody's business was in trouble. Hers was too, it was right down on the rocks...

Q What did she do? She worked for a recording company?

LS She [].

Q I see.

LS There was nothing I could do [] I was in New York here for about five days hunting [] and I was out of money by that time. I wasn't staying with my sister. I was staying in an apartment with an old friend whose apartment was actually under repair. I eventually got work from [] lady [] and I was having trouble with that....it [] wasn't giving me enough money [] had gotten about three parking tickets...and I was sure that I was about to be arrested, []

Q Did you leave St. Petersburg [] in the car? In your car?

LS Yes.

Q I thought you had no transportation to get to school and [].

LS Well I didn't [] I got a loan from a close family friend which was also []

I left Florida in October []
I was in fear of being violated this time mainly because of the tickets, however, the parking tickets []

[] I was giving up on everything else... [] I would eventually be violated anyway. I was extremely reluctant to return to [] I went to the Burger King after considering other... []
[] I went to the Burger King crowded as it was []

].

VW []

LS Correct. []

I felt independent...

wasn't too concerned about []

and I tried to rob []

Q Where'd the gun come from, Mr. Shepard?

LS Well, these people I was talking about down in Tampa, part of the crowd I felt involved with yet didn't feel...-[] really with gave me this gun.

C This was while you were still in Tampa...

? Do you know that that in itself is against the rules of your parole?

LS Yes, sir, I do.

Q Had it ever been used by anyone else?

LS No.

Q According to the record you had some ammunition on you, too... []

LS I believe []

Q [] you [] back to your sister, apparently, what was... you say you went into the business... was there a particular thing you had in mind. Was that to go back to Florida or to exist here or go on some place else?

LS That was to get out of New York. I didn't have gas money. I needed gas money to get out of New York. What I was doing was... [] excusable, [] was irrational and unbalanced []

].

Q Now the actual charges accordingly would have been, you pled guilty to the attempted robbery.

LS Attempted robbery, yes.

Q Is that a bargaining against the other counts? Attempt to use a fire arm, wreckless endangerment... resisting arrest.

LS Well, sir, I didn't bargain at all. When I went for my arraignment I plead guilty to what they...they have me charged with about four different counts. I don't think they...they originally booked me on attempted homicide I believe. I think they are aware that those charges are not really applicable. I suppose the attempted robbery, that was...there was no question of that. [] I attempted to hold up the Burger King and I didn't succeed because of the intervention of these police officers. In the struggle the weapon was fired... [] ... after the place was cleared...[]

] It

wasn't pointed at anybody. It was never intended to.

Q Did you point it at the girl?

LS I pointed it at the girl, yes, sir.

Q Was it loaded at that time?

LS Yes.

VW []

].

LS I think I considered it but obviously not in the right perspective...[]

].

VW [] Another thing is, regardless of where you went if you have a loaded gun... [] regardless of what, if it's a big bank or a small store, you go

anywhere with a loaded gun somebody could have gotten hurt...
How much ammunition did you have?

LS I had about sixty rounds.

VW Why did you have sixty rounds if you didn't [

].

LS Well, I didn't intend to shoot anybody, for one thing. I didn't even intend to have pointed the gun at a girl behind the counter []... to approach the manager and have him have one of the girls [] from the cash register. I can not explain this in anyway that it would appear rational

VW [] You could've gone in with an unloaded gun, and still have gotten [

].

Well, although I had not intended to shoot anybody there were instances in which I had decided I would use the gun. I would not shoot anybody to get the money... []... but I had not anticipated problems inside the place itself. I had anticipated possible problems with pursuit... [

].

VW [

].

Q Anything else that you would like us to know about this particular allegation, Mr. Shepard? You did plead guilty.

Yes, sir.

Q You were not on bail, I gather from the record from the time that you were arrested, because it looks as if you entered your plea within a couple of days, you were not sentenced till December but you've been in custody all that time. My reckoning would be that you've been in custody at this point [

]...approximately 27 months.

That would be October 1974 []... Alright, just to continue a little bit on that now, when you pled guilty, where did they send you? Did you go strictly to Dannemora first?

LS No, sir. I went to several places after they sentenced me. I went to, first to Riker's Island for [] days. Then they sent me to Greenhaven for a couple of weeks. From Greenhaven I went to Ossining for a month, and from there I went to Clinton in February. [

].

Q [] any kind of programming activities [] in incarceration has been mostly at Clinton.

LS Yes. All of it.

Q [].

LS No, sir. I... considering after the fact that a lot more came to my mind than it did before the act. Even so, before the act I felt confident that nobody would get hurt, that I did not intend to get hurt...[

]...

I knew what my intentions were.

Q Let me ask...[]...

Mr. Shepard, now you left Florida and you came up here. You stayed around for awhile. [] didn't know you were gone. I gather you had no intention of staying here if you could've processed that tape or made some arrangement [] gone back. Would this be the [] why you didn't try to contact Federal Probation authorities here? In New York? Just say "here I am", so that they could get in touch with [].

LS You mean when I first got arrested?

Q Well, no. Even before that. When you found out that your tape wasn't working out and that you weren't living with your sister and you were getting parking tickets...and as you say, you knew that perhaps your revocation was imminent but you in a sense didn't turn yourself in to avoid a lot of what happened later. Anything significant in there or it just didn't occur to you?

LS My attempts were to...keep from going back to prison...

Q And you again, not putting words in your mouth, would probably be still on [] if this hadn't happened. Would be still trying to stay out of prison, if you hadn't been caught. Suppose you'd been successful in the Burger King, and...

LS I'm kind of glad the way it turned out. I don't think I was... [].

Q [] while you were down at Tampa, were you involved in any other things, and that might be considered...[]...were you using drugs for example? You say you lived or you had acquaintances who were using drugs, you yourself wanted to get away from Tampa because of the environment. And [] said only about two blocks away there was another drug culture and you should get out of there. Were you using drugs while you were []?

LS No, sir. And my acquaintances weren't either. It's just that I couldn't form any meaningful relationships with the people around me because most of the people were involved in some way or another with this type of stuff. I mean in some, not necessarily an organized fashion, I'm not talking like that, I'm talking about stuff, all kinds of garbage that was so prevalent out there on the

LS(con)

street and the people in that area were so susceptible to it that I couldn't relate without becoming deeply involved myself. Not only on a legal stand-point, I did not care to get involved in that because I thought it was very []... As far as the [] went, I had my own house, [] were people in the area, this was not the area in which I had been raised, there was nobody there that actually knew me...I could easily pick and choose who my acquaintances were, and I did to see the prevalence of the drugs there in that area... it seemed to me that if what Mr. [] said was true, that it must have been at some time in the past and had recently been diminished a great extent. Police were prevalent in the area...[] and it was a fairly small community.

Q Let's formalize that a little bit because as I told you earlier, I think the crux of something like this is whether it establishes violation and then of course to look [] the future. Let's look at the past a little bit. When you were released from Tallahassee, you went to Tampa?

LS Yes.

Q Now, what was your plan at that point?

LS My plan at that point was to...

What were you doing? You were on an approved plan according to the record.

LS This was where I think my biggest problem came in because although it was an approved plan it was not very established.

Q What was the plan?

I The plan was to get in school.

Q In the Tampa...area...

LS [] woodwork, either on of those. I'm not even sure, I knew what I intended, I'm not sure whether work was one because of school, and I'm pretty sure it was school... It was emphasized because of [] with the D.A. []].

Q I'm sure somebody at one time or other [] what are you going to do when you leave, normally you go to school and use your G.I. benefits. Where were you going to live? Were you going to live alone, were you going to live with relatives? Were you going to live with your mother...

LS Initially I was going to live with relatives...[]...Until I got established, then I would be able to live by myself...

Q Were you living with relatives in Tampa, were you living with them when you decided you'd better go to St. Pete? In other words, I'm trying to establish...[

].

LS I was living at home for about three weeks, then I moved to a garage apartment a couple of miles from...[

[]... and my brother and I shared the
[] my younger brother, who has having
problems at that time. He was also on probation and he was deeply
[] and I wanted to try and help him...

Q Now were you working, was that when you went to work as a cab driver?

LS Yes, sir. I had been going to the employment agency and eventually I got a job as a cab driver... The Yellow Cab Company... [

[]...this would lead to my unemployment, it
led to my unemployment...because I was driving 7 days a week,
14 hours a day and I refused to take a call. I told them I was
too tired, I didn't feel it was safe to drive. They wouldn't
let me drive again so I went to another cab company and they hired
me. I worked...[]...

Q I see.

LS I was working with them up until the time I came home about 5 o'clock or 4 o'clock in the morning.

Q []...the job you had then, or is...
[] when you went to St. Pete?

LS Yes.

Q There you didn't have that much success in getting a job...
[] because of [].

LS [].

Q Are you married Mr. Shepard?

LS No.

Q No dependents.

LS No.

Q Let's do just a quick jump, we'll come back. Your plan now if you were to go out on parole again apparently is set around going to school. This time at Clinton Community College, right?

LS Yes.

Q And Clinton Community College is exactly where, Clinton, New York?

LS Yes.

GJ Plattsburg, New York.

Q Now I understand that you have been involved in those courses while you were at Clinton.

LS Yes.

Q Again, we get down to []... if you were to go to school as you planned, what would your living plans be. I gather that's not a live-in place if it's a community college.

LS Well, there are dorms available, but I'd have better success in getting a youth parole plan than any other...[]

Q What [] your state parole plan [] talk about now? It [] you to go to Clinton Community, what does it cost you to live?

LS Mr. Pete Smith, the general [] and he rents apartments to students... [] and he guarantees that he will have a place for me to rent on that date.

GJ Mr. Hearing Officer, I would give you a copy of the letter from Mr. Smith, guaranteeing housing as well as part-time employment. I think it might be appropriate for me to say at this point that I spoke to Mr. Smith yesterday on the phone. He sent me another letter reaffirming his commitment for employment and in addition, he told me that the commitment for employment would be such that he would still be able to go to school. He'd had construction work that Mr. Shepard could do...in the evenings, late afternoons, or on the weekend, so that he'd be able to work and then go to school at the same time. Unfortunately, because of the mail service the letter hasn't made it to my office []...but the commitment in this letter which is dated October 3, 1976, has been reaffirmed by Mr. Smith.

Q I see. May we have this letter? Thank you.

LS Now, that's part of it. I'm already enrolled in Clinton Community [] participating [] on a full-time basis for the last year and a half and have completed 37 credits.

Q What's your major goal in your education. What can you get out of community college, an A.A. degree?

LS It would be an Associate A.S. degree in [] science. I intend to continue, I have my [] benefit [] ...While I'm here in New York, I also [] grants, state grant, Tap award, and federal grant which effectively almost cover my entire tuition.

Q Have you received this?

LS Yes, I've been receiving it for the last year and a half. As well as my V.A. entitlement. This allows me to use almost every penny of my V.A. entitlement for my sustenance, and this would go... and I have saved money. I have...

(END OF TAPE ONE)

Q How long do you think it will take you to complete the courses that you're taking at Clinton?

LS I believe that I can have my A.S. within a year. Then I can take more courses, I've been limited to 12 hours...and...

Q And you're going on. What's your major?

LS I have not effectively gotten into my major yet. I hope to continue past my Bachelor's in marine biology. This would effect a move eventually to another university in another place. I owe the state two years on parole.

Q Until October 1978, I believe.

LS Yes. I would eventually expect to move. I would like to major in marine biology. It took me a while to find an area that I felt capable of, any area but only pursuing an area [] not my interest. Marine biology seems to be a wide open field and my school counselor feels it's a good area to pursue and it's something that interests me deeply. Marine biology and related oceanography and stuff. And [] a second major I have to find [].

Q So, as far as you can see, living-wise, goal-wise, far as school is concerned, you are a lot better off than when you went down to Tampa some two years ago.

LS Yes sir, I'm convinced of it. I've...[].

Q Let's []
As I told you before []
the reasons for and the reasons why not. So let's get into some
little things that I'm sure []
Now, [] the G.I. Bill before
[]
enrolled or cancelled [].

LS That was my intention.

Q What prevented you then and now?

LS My problem was meeting the requirements of living out there at that time, and not having a plan already established. Not having the enrollment, []
Problems with transportation to the point where I effectively...
[] transportation was
only one of my problems.

Q Well it looks a little better for you now. I guess [] You had to stop long enough to get into it. And now that you're into it that's why it might not be a bad field. Now, Mr. Shepard, we do have information... [] that overall you've been doing very well indeed at Clinton particularly in the ...[] education field. Would you tell me briefly what other program has been going on at Clinton other than [] .

LS I was involved in classes...[] .
My first job at Clinton was as counselor. They interviewed me and I found out that I could speak Spanish. And they had a situation where they needed a [] and one that could also translate for me, because there are a lot of Spanish-speaking inmates there. I originally got a job in the service unit where all the counselors work. I was the only inmate working there. And I was translating for them [] .
I got into counseling [] on a daily basis with my counselor there. Because of that opportunity, as well as [] with other counselors, that is what started the thing. Eventually, I moved from there to [] typing and [] and I wanted to improve my typing skills because I had hoped that someday, I have an inclination I want to write. But a [] .

Q Do you have a clear conduct record there?

LS Yes. I have two...one minor infraction... A guy notorious for [] and decided to write me up for the coat hangers that I had hung my clothes.

Q Was that contraband, or you did you have them hanging the wrong way?

3 No, it's classified as contraband, it was something that you... they were all over the joint... and the laundry brings them to you but they're supposed to be turned back into the laundry. This has changed, the laundry [] somewhere else, and these coat hangers everybody can use. But he wrote me up for having an unauthorized coat hanger, and that's the extent of it. I moved from Clinton Main to Clinton Annex which is medium security and they gave me a job at the clinic where I continued to improve my typing skills. There was an officer there, I was in the presence of an officer and a nurse all day. This nurse was a psychiatric nurse, too, and I worked with the nurse and the officer for approximately a year. This officer was also trained in things like [] and stuff. We developed in my view a pretty meaningful relationship over the year, so I learned to deal with a lot of frustration and administrative frustration, too, that previously I had [] and the work [] and at the same time I had begun participating while in Clinton in the school program. It took me a while to get in to that, that was something which took place four nights a week. I was going to school for four nights a week at the

Annex, too. At the Annex I had to come from the Annex back over into the prison every night for school.

Q Were you in any kind of formal psychiatric or psychological counseling?

LS There was other than my, my opportunities were actually better than anybody that was in any such program. There were no real programs for psychological counseling. There was a situation where according to need, a person could see Dr. Reyes, the psychiatrist, and talk to her, generally people with...having such a hard time that they needed some kind of medication. I received the benefit of her help, but not in a formally recognized program. I was working for her...

Q Dr. Reyes? R-e-y-e-s-?

LS Reyes. Yes...she also wrote a report on me.

I asked that because in looking back we look to the future. We do know as you have already told us that originally you were released on parole earlier, at least you would have been released on parole as you went out to the halfway house, and that didn't work. What happened? What happened that blew that?

LS Well, that situation is... I'll explain it from my point of view. I was scheduled to go down to the halfway house for four months. They had requested... the halfway house had written [] ask if it would be better if I were put in the drug program. I had a drug [] which was [] in the halfway house.

Q Was this the good will []?

LS Yes, this was the good will []. And my caseworker informed me that I was not to be put into the drug program, the intention was for me to go down there to find work, to find a job...get established in a job. Not to...[] the drug program. And when I got down there, in spite of what Tallahassee told me, they put me in the drug program anyway. And in this place, this was a ... it's hard to describe the place. It was a little emergency hospital when I was there. There were several juveniles there who were...some of them even voluntarily. The drug program...[] it was a very restrictive thing, I couldn't even go out of the building for [] week, which was no way in line with my purposes. I didn't need [] I needed to go out and find work. Which through...this program I couldn't and they did not want to let me out of it, they resisted it. I don't know why, I'm not sure, I have my ideas about it, but they're not necessarily correct. But I told them that I wanted to go to the halfway house...[] eventually [] Tallahassee more as a, I think, more as a threat to me than anything else, but that's exactly what I wanted them to do and the minute they did, Tallahassee told them to put me in a halfway house. By the time I got to the halfway house, which

was like a week after I'd been down here, I got involved with a counselor there who I feel that they resented []... I immediately felt that I was walking the line. In other words, my counselor started interrupting and holding back on my allowance which was supposed to be a weekly thing, and not to be controlled by them, simply administered by them. And I definitely felt that I was being censured.

Q What was the thing that finally...

LS The thing that finally did it was I had spent the night at my brother's house [].

Q And that was a curfew violation?

LS Yes. It was a curfew violation, and I came back the next morning and they called the marshal, the [] marshal.

Q Have you...[] What's been going on in your life that now has changed, because I'm showing the 64-dollar question to you now. What's so different about you now, Mr. Shepard, that as you see it will insure success as against two or three years ago it looked to be a series of failure.

LS Well, I feel that [] in my life, many problems occurred because of great emotional imbalance...emotional and psychological imbalance that was more or less, I feel, in my [] manifested during my adolescence...adolescent period, there are reasons for this in my background I believe that you might be aware of, I don't know if I have to go into that [] or not. It was part [] childhood experiences...

Q That []

L Yes, sir. Partly. And I went through a lot of [] when I was going through heavy depression, emotional depression, I wanted to resign from the world. I didn't want to have anything to do with it. I did eventually become involved in taking some drugs, alcohol I got fairly involved with while I was in the military...and although I don't feel the problems necessarily stem from drugs. I don't think they stemmed at all from drugs, [] especially and particularly priced drugs were more or less experimental than anything for me in my...[]

Q Did you use hard drugs? Heroin, cocaine?

LS I snorted heroin one time and I snorted cocaine one time, I took acid two times, LSD two times, and I used marijuana on frequent occasions...[]

Q But this is not a problem that you can't overcome, it's not an addiction type of thing...

LS No, sir. I've never been addicted to drugs. I did have a problem with alcohol.

VW What does that mean?

LS I feel that, hopefully through my reflections I've been trying to get to the root of my emotional problems, because the trouble that I've been in for the last few years...it's almost undefinable, the extremes that it's gone through and I don't feel that it's necessary that I spend the rest of my life in prison, in and out of prison and stuff like this. I don't feel inclined to ...I don't feel particularly inclined to a particular criminal way of life, you know I feel I must follow. Before I started...[

[] So, I'm trying to [] the problems that led me into this situation, and in doing so I hope I will have enough success at understanding...[] I can cope with the alcohol problem as well. That is actually [] it's hard to say that simply because I've been in prison I haven't had anything to drink...

VW [] concerned []
However, when you committed the offense []

LS []

VW []

LS The alcohol get me in trouble with the problem, and I can't say that because I haven't had anything to drink for two years that it isn't necessarily going to be a problem. I have to consider the problem...

Q Were you in any kind of A.A. therapy at Clinton? Or was that []?

LS I did participate in A.A.

Q [] that kind of stuff, Mr. Shepard?

LS I don't think it would really help. I had a brother that was in... I feel that ...rooting out the problem, my emotional problem and effectively learning to function []
I think I've had some success because I regard alcohol as a symptom more than a cause. I feel that I've had success even though I was drinking at the time of that crime. I think the absence of alcohol wouldn't have made any difference. I'm not trying to vindicate alcohol. I feel that my problem there is not major, or hasn't been major. I felt that it could be if something weren't done to achieve or better balance for [] myself all the way around. I can't stand the thought of [] walking out and going back, that's why I work so hard in trying to get a program together...

VW []

LS That's a possibility ...I'm very aware at this point of alcohol. I don't intend to allow it to manipulate me. [].

VW [].

Q Well, I have one other here and I just want to make sure that Mr. Shepard gets the benefit of everything. Mr. Haley could not be here.

LS Right.

Q Mr. Shepard, if Mr. Haley were here, what would he say?

LS Mr. Haley...[] I consulted him fairly regularly on what I was doing and where []. I'm sure he felt that I made some progress. And that I have a very good prognosis.

Q What was his official...is he a correctional counselor? Was he the head of your unit? Or whatever?

LS When I was in prison last year or so, I also knew him in Clinton Main. I spent over a year there at the Annex. After I came to the Annex, he came to the Annex, and was assigned to me [].

Q So you've known him for a good bit of the time you were at Clinton.

LS Yes, sir. I've known him for the whole time.

Q He would attest to what you feel would be an overall appraisal of your adjustment there as very good?

LS Yes, sir. I'm sure that he would. As far as I know, anybody that was involved with me there, I got nothing but good feedback and on my efforts, on all my efforts, even including the parole board and school counselors, my officers, my [] I have no reason to feel that any of them would say otherwise [].

VW I have one more question [].

GJ I think, if I may interrupt for a moment, Mr. Haley's given me a letter that we ...he wrote to the Parole Board in which he says that Mr. Shepard at this maintains a record of excellent institutional adjustment. The letter is dated October 14, 1976. He goes on to say that in the opinion of this writer, Mr. Haley, Lyman has undergone significant personal growth while incarcerated and has learned to direct his energies toward a viable self-improvement program. Despite numerous obstacles, his overall attitude has been positive. In his cover letter to me, he closes his letter, he expresses his hope that Mr. Shepard obtain a favorable decision from the board. I have provided a copy of these letters for the hearing. Again, I spoke to Mr. Haley...[] during December and he again expressed to me that Mr. Shepard made an excellent adjustment to the institution, and made serious

GJ (con)

personal changes, and in his opinion would ready at this point for parole. He felt that Mr. Shepard, much as any other inmate he had ever known ...could succeed on his parole at this time.

Q Also, from what we've been talking about, had the [] that Mr. Johnson is anxious to subpoena, would they say pretty much that you have told us about your programming there, your schooling?

LS I'm not sure exactly what the record would consist of, what various reports the record would consist of. As far as my adjustment there, there would be a favorable report. There are reports that I would like, prefer you to see, such as the analysis by a psychiatrist, and stuff like this that I feel would add more...

Q Have you seen those reports yourself?

LS No, sir, but I have the parole board, the state parole board's opinion of the effect of those reports.

Q What do they say? Is there again indicating a little bit about what Mr. Haley says that you now have undergone changes from the old Mr. Shepard to the new Mr. Shepard?

LS Yes, sir. That's more or less the impression I received. The parole board was, [] I couldn't believe they didn't even ask me questions. They [] if I had any questions. They [] [ring] ...so I would assume that the record was fairly good.

Q Mr. Shepard, is reasonable to assume that had you not had the good adjustment as you see it that you would not have been paroled by the state? That they would in fact have carried you through to your minimum expiration time and then released you to that detainer. Rather than saying, "Well, we've got a detainer, we might as well parole him because he's in," I'm just trying to get your appreciation of whether you really earned that parole out of Clinton on the basis of what you did, not because there was a detainer and there was some other holds about to take place at a future time.

LS Well, let me say two things...[] First, the only way that I can judge by that is the first time I went to the parole board for them to set my minimum release date. It wasn't a very favorable hearing to me. They set my minimum at two years which was the maximum they could set it at. This was before adjustment could be accounted for, before program results...

Q This was at the classification time.

LS Yes, in other words, they effectively set my minimum at two years, where the court had declined to do that. When I returned to the parole board in November of last year, they seemed very pleased with my progress...[] especially with regard to the school and [] and to my academic record. They expressed a desire to parole me

since it was my intention to continue such a program. As a matter of fact, they never once even mentioned a warrant. At the end of this, which only lasted about a minute or two minutes, he was just doing the talking...[] as far as my intentions. He asked me at the end after indicating that they would probably parole me, if I had any questions and I asked just one. My minimum release date was December 23rd. I asked him, the parole board [] if they were going to , if they were considering releasing me. I asked them if they would consider releasing me between semesters so that I might have a little time to get established. Even though things were fairly well set up, there's a certain amount of adjustment...[] simple things as buying clothes and like that. [] what I asked them was just if they would release me between semesters. And he asked me when would that be. I told him that my present semester would be coming to an end towards the middle of the month, towards the middle of December. He took it down, he noted it and he said they will take that into consideration. [] they paroled me to December 15. [] minimum release date was set by the parole board [] . I feel that they were...[] .

Q They were doing it on the basis of what you had accomplished, whether or not there would be any sort of a hold.

GJ I think, here's a copy of Mr. Shepard's parole slip. As a matter of interpretation, the decision at the bottom, ODOP 12-15-76 through 5-77 2D. That means Open Date Open Program as of December 15, 1976. 5-77 Board means that if the program should not be approved by the field parole office up there, he again meet the board. And program six refers to [] and work part-time with Peter Smith in construction. So the decision here was definitely made on the basis of his program and not for the warrant.

Q I see. That's what I was looking for. May I ask you Mr. Shepard, when does this next semester start, or has it already started at Clinton?

LS Well, Mr. Johnson informs me that he called my school counselor there that, Mr. Woodward, my school counselor said that registration [] .

GJ Registration is the 17th, and classes begin the 19th, but it is impossible for him to register late.

C I see [] you wouldn't necessarily have to miss the whole semester, if you couldn't meet registration or starting date.

LS No, sir. I don't think so.

Q Well, suppose you did, would you be working for Smith in between [] .

LS Well, that would be definite. That would be my only alternative.
[]

Q You're going to stay around and go to Clinton, is what you're saying.

LS Yes, sir.

Q That's solid.

LS I have accrued a certain amount of savings that could help in respect to this []

Q If it did come to that, I'm trying to establish [] would you have forfeited your right to go to school if you did not [] in time for the starting date of registration. Apparently, no. You can register late and you can start late...

● I believe it's feasible up to a certain point.

VW [].

Q But even if you couldn't meet that deadline, your plan would still be to go to Clinton.

LS My plan would still be to go to Clinton. [].

Q Mr. Johnson, would you want to introduce any of your character witnesses at this time...

GJ Yes, I would. I do have some letters. I don't know what papers the board has before it and perhaps this would also simplify matters if I could have disclosed exactly what papers, in particular what institutional reports you have before you.

Q All right, let me tell you what we have readily on hand here.

LS If we're going to be a while longer I have to go to the bathroom. If not and there are other questions for me [].

Q Well, I don't know...I'll tell you what we can do. I think maybe the Government should go and we'll cut it off right here, and in the mean time we'll discuss your strategy with Mr. Johnson about bringing witnesses in. All right?

GJ I would just ask that the transcript reflect that you have before you a letter from James Williams...excuse me, from Fred Woodward, Coordinator Inmate's Higher Education Program.

Q Yes, sir. We have that.

GJ A letter dated July 22, 1976, from James B. Pletcher, the Vice President for Academic Affairs. Both of those letters...

Q Yes, sir.

GJ Both of those letters relating to Mr. Shepard's excellent performance in college.

Q See you made the Dean's list, Mr. Shepard.

LS Yes.

GJ And also you have a copy of the transcript from Mr. Shepard's studies indicating 4.0 average.

Q Yes, sir. We have that.

GJ I would also like the transcript to reflect that the only communication in the record from Mr. Haley's letter dated October 14, 1976, and the covering letter which...I submitted dated November 10, 1976.

Q That would seem to be the case, Mr. Johnson, on our review of the record and unless this decision here somewhere perhaps out of chrono, we do have Mr. Haley's letter of October 1976 which at the moment seems to be the only one that I can find. And we have, you have presented us with a copy of that again.

GJ I think that it's clear that there are no psychological reports or other institutional reports compiled during his stay while at Clinton.

Q There does not seem to be any file that we have.

GJ One final thing and then I think that we can then [] witnesses who are waiting outside. Mr. Amy told me that she had also [] a report...it was that report before the board?

Q Well, I don't know what report you are referring to. [] Yes, we have this.

GJ May I have that report.

Q Yes. I see nothing in here that []

GJ Thank you.

Q This is normal procedure []

GJ Thank you, []. If I may just inquire what procedure that you would like to have followed regarding these two witnesses.

Q All right, sir. Mr. Johnson, if you will bring them in and introduce them we will need for the record their names and I will leave it to you then to elicit from them any comments you want...if you have any questions.

GJ Fine. []

Q Oh, no. I don't think you will be in that long, Mr. Shepard.
All right, Mr. Johnson. If you would proceed, we're on record.

? [] you introduce yourself.

JS I am Janet Shepard.

Q Janet Shepard.

JS I am Lyman's sister.

Q And your address, Ms. Shepard.

JS 345 West 5th Street, Apt. 15M

Q New York City?

JS Right. Zip code 10019.

[Unintelligible]

Q All right, proceed.

? [].

DS Diane Lyman Shepard.

Q Are you his sister, too?

DS Um-hm. And my address is [] Street.

Q What []?

DS W-u-r-t-s-c-o-r-n.

Q All right.

DS [].

Q Thank you.

GJ I think to make things clear in the transcript I will address you by your first names. Diane, how often have you visited Lyman while he is incarcerated?

DS Well about once a month, at least. I spent the winter, part of the winter in New York, [] was in Florida so I'd write when I was down there. But when I was up here I'd try to [] at least once a month, sometimes... one time [].

GJ []. You've been able to speak to Lyman during this [] experience [].

DS Yes.

GJ How do you think he's adjusted? How do you think [
]?

DS Oh, I just... oh, I feel a lot closer to him...[
we've been able to relate. [
every time I went to visit we've been able to relate [
]]

GJ How do you think he [
] .

DS Well, he felt more [
] .

GJ How would you [
how he was [
]]?

DS [
I] he knows himself better
] .

GJ How old are you?

DS Twenty-two (?)

GJ If Lyman were to be paroled, [unintelligible].

DS [Unintelligible]

GJ Do you think that the fact that you've been able to visit
with him has [unintelligible]/

DS [Unintelligible]

GJ [Unintelligible]

DS [Unintelligible] ... right now, I'm going to have a baby,
so [unintelligible] I'm not really [unintelligible]
my old boss [unintelligible]

C [Unintelligible]

DS [Unintelligible] ... about 80 miles northwest of
[unintelligible]

C [Unintelligible] ... how long it would be [unintelligible]

DS [Unintelligible]

C How far [unintelligible]

DS Well, I work[ed] for [unintelligible]

C [Unintelligible] ... Mr. Johnson, you've been in touch with your brother while he was up at Plattsburg, and I figured [unintelligible] how long it would be and how close [unintelligible] You'd be available if needed, I guess?

DS Oh, definitely.

C [Unintelligible] 250 miles every other day

DS [Unintelligible]

C [Unintelligible] ... even more...

DS (Laughs)

C That's all I have to say.

GJ [Unintelligible] Janet, [unintelligible]

JS Uh, yes, sir.

GJ [Unintelligible]

JS [Unintelligible]

GJ You were here when Lyman came to New York a few weeks ago?

JS Right, um-hum.

GJ What happened [unintelligible]

JS Uh, from what I saw, not only are the opportunities [unintelligible] ... as far as employment and everything, but Lyman's situation personally was very desperate trying to find work, uh, I remember when I was talking to him on the phone, I [unintelligible] ... was there on a visit for about a week, so I saw him, and then when I came back up to New York, [unintelligible] ... trying to find a job [unintelligible] ... desperation, [unintelligible] one of the men who kept promising him a job, kept promising and never came through. I remember he borrowed money for his car, [unintelligible] ... in Florida, [unintelligible] ... car, so he borrowed about \$800, something like that, from my mother's [unintelligible] ... but at the time, it was my mother's [unintelligible] ... for all these years, and it was very depressed [unintelligible] about not being able to pay her back, the way he wanted to, so that was bad on him. And there was just nothing [unintelligible] the timing was wrong, the opportunities just were not there, and desperation set in and [unintelligible]. So I [unintelligible] in a very desperate sit-

uation, and it was a lot different from what is happening now, you know, the difference between night and day, but, uh, [unintelligible] ... two and a half years.

GJ What did you talk about?

JS [Unintelligible] ... about 37 credits in school, he's a good student, an excellent student, and he's also [unintelligible] ... in Dannemora, which he didn't have, he had nothing at all [unintelligible] Florida, he was in pretty bad shape anyway up in Ossining,² and I just think it's a whole world of difference, being up here, being in school and in a program [unintelligible]. I've been in touch by letter with him ever since he first went up to Dannemora, and his attitude [unintelligible]... much for the better. He seems to be able to face adversity much better than a few years ago. He's much more of an adult, and I'm a little bit more of an adult myself, so I can see it, and I think he can be much more responsible. [Unintelligible] ... and he may not have a choice [unintelligible] ... face these decisions pretty well [unintelligible].

GJ [Unintelligible]

JS Part of it.

GJ [Unintelligible]

JS [Unintelligible] ... well, as much as a person can be when they're not exactly in control of the situation, I think he's very [unintelligible] ... a couple of years ago, and when you grow a little older -- you know, he was a very young adult then -- he's a little bit more of an adult now, a lot more, and when you're in that age of the early 20's, mid-20's, every year you grow much more.

GJ [Unintelligible]

JS [Unintelligible/background noise]

GJ Do you think now that the family [unintelligible]

[Both DS and JS appear to answer, but the background noise makes the answers unintelligible]

JS ... looking forward to the time in life when he can raise children [unintelligible] property in the [unintelligible] mountains, and he's looking forward to building [unintelligible]... feels much better about having [unintelligible/DS interrupte/unintelligible]

GJ I]

LS I want to say that my family []

Q [] ... make a closing statement at this time, or summary?

GJ I'd like to make a brief summary. Uh, []
I wish that we did have the record from the prison to present to you. When it comes down to it, Mr. Shepard is a new person. He has direction, he has a goal, a realistic assessment of what he has to do and what he can do. I think that the parole program that he's worked out, which involved going to Clinton Community College and working in Peter Smith's firm in Plattsburgh, gives him a sound grounding []
succeed on parole.

I think that two years ago, when Mr. Shepard was released, he wasn't prepared []. But now though, fortunately, the type of program he went through at Clinton, now is the time when I think he is ready. His family's secure, his family is now available to help him deal with his problems, whereas a couple years ago that wasn't [].
He's received intensive psychological help at Clinton, and he's also [] a job [] and [] his contacts with Mr. Haley. And I think as Mr. Shepard put it, he now he's begun to understand, he now understands the emotional problems he was having and learned to deal with them. I think he's exhibited [].
I think it would be appropriate not to interrupt the rehabilitation program that is already under way. New York state paroled him because they feel that now is the time []
now is the chance for him to make it on parole, make it as a good member of society. He was working at this program for several years while incarcerated, and in fact New York State was so impressed that they released him a few days early, which is quite unusual. I think that to interrupt this program would be inappropriate []. It just wouldn't make sense because he's come a long way. He may have a little bit further to go, but he's moving in the right direction.
[] it can be continued by a favorable decision.

Q Mr. Johnson, we thank you very much. Thank you, ladies. Mr. Shepard, if you'll all stand outside now we'll discuss the situation with Mr. Shepard and Mr. Johnson.

Q Mr. Shepard, Mrs. Van Waldraven and I have now completed our deliberations in this case, and we are prepared to give you two tentative decisions, and I would again remind you that whatever we give you decision-wise has to be reviewed at our regional office. You will get the official decision [] within 21 days. []. Our first decision is to revoke your parole. We are revoking it strictly on the admissions []. We are not [] what would have been the admitted other violation, with the gun []... are perhaps failure

to report since you left the district without permission and [] Now in your particular case there will be no decision [] we normally be making as to time spent on parole to be credit as your time is running any-way. []

The third decision we give you is really based on what the Commission now provides, namely reparole guidelines, from which we must assess and classify the parole violation behavior either as an administrative violation or as a violation of new criminal conduct. []... offense. In looking at the offense, we took up the philosophy of the Commission as to what we call offense behavior, you remember the old guidelines, [interruption/untelligible] and we have decided, and again, this is a tentative decision, that we would place the conduct in the greatest severity range, because of the fact that a weapon was discharged in the commission of a felony. Now, we have given you credit for 27 months, in state and federal custody, from the time of your arrest on that offense. The reparole guidelines would call for service of at least 48 months, because the computation is made on the greatest, there being no maximum time, as you probably know, a minimum suggested time of 48, this would be the top figure under "very high" which is the offense [] You, of course, have some 14 or 15 months left on your sentence. Any decision that we would give you that would be favorable would have to be considerably below those guidelines. [] We have given you tentatively a decision below those guidelines. The tentative decisions is to reparole you effective March 15, 1977. []

[] same plan with the state [] The March 15 date is, of course, the customary time for processing. []

I think a more immediate impact would be the review process here. The review is conducted by the administrative hearing examiner and the regional commissioner. The regional commissioner now, under the new procedures, must review all parole [] individually himself [] . In any

event, our greatest category [] . This, as you know, is quite a bit below the guidelines. As a matter of fact, you wouldn't even reach the bottom of the guidelines before your term would run. [] to justify it on the basis that, although there was a weapon discharged in the commission of a robbery, it was unintentionally discharged, as we find. It was done in a scuffle, I believe. You have no prior history of violence. You have achieved what we believe to be an outstanding record while in state confinement, and have a solid and viable release plan at this time. Now, whether or not in all circumstances this would be adopted, I don't know. I bring it to your attention because the review process is very [] and stringent so you may not get [] . The way I see it now is to revoke the parole for the reasons I gave you and to reparole you in a couple of months, on March 15, 1977. [] much of this will be going into our summary, which of course will be the guiding document for the review. Are there any questions at all?

Q Mr. Johnson?

GJ I have just one question. I have the letter from Mr. Smith, will be arriving in my office, probably tomorrow.

Q Send it on to me.

[].

GJ By what time [].

Q []. Well, he won't get anything from us. He'll get a final decision, which may be the same as the tentative decision, and may not be. There are two decisions to be reviewed -- one on the revocation, and one on what we call the alternate.

? [One of the sisters?/unintelligible] [Maybe one of the examiners -- a woman's voice/unintelligible/something about federal custody and working it out]

Thank you very much.

A Commissioner: Good luck.

Q Good luck to Mr. Shepard.

UNITED STATES PAROLE COMMISSION
HEARING SUMMARY

Name Lyman T. Sheppard Reg. No. 37289-115
Panel Quirk/Van Walraven Hearing Date 1/11/1977
Type of hearing Revocation Cass. No. 7048-P Institution MCC, NY
Mr Date : Unknown Full term Date: 4-09-78

Counsel and witnesses: Gordon J. Johnson, Esq. Legal Aide Society,
15 Park Row, New York City, N. Y. 10038. Telephone 212-577-35
Witnesses: Janet Sheppard (sister), 345 West 58th Street, New York City, NY 10009.
Diane Sheppard, (sister), General Delivery, Wurtsbory, N.Y. 12796.

Previous Commission Action: Sheppard was originally sentenced to a YCA 5010B term on July 7, 1972 in the Federal Court in Texas, for violation of the National Motor Vehicles Theft Act. He was originally confined to the Federal Reformatory at El Reno and had his initial hearing in November, 1972 and was continued for a review hearing in July, 1973. On July 11, 1973 he was granted a parole effective 11/12/73 through a Community Treatment Center but on 11/08/73 as a result of a failure in the CTC program the case was reopened, his parole date was rescinded and he was continued for a hearing on the next scheduled docket. However, on 12/27/73 the case was reopened and Sheppard was paroled on 4/18/74 to an approved plan. He allegedly violated parole on 10/18/74 the warrant was issued on 1/09/75, placed as a detainer with the New York State Authorities. Subject was then serving a state term. He was paroled from the Correctional facility at Clinton, NY on 12/15/76 to the detainer that was lodged at Schenectady County Jail until he was returned to the MCC on 12/30/76. As previously mentioned his full term date is 4/09/78 as his time has been running uninterruptedly because of the YCA sentence. On 1/04/77 he executed an I-16 form asking for appointment of attorney and in response to this the Federal Court appointed the Legal Aide Society as his counsel.

NOTE: It should be reported at this time that counsel has made three requests of the panel as indicated below, was allowed to make these requests on the record and the panel decision as to each was also recorded.

Mr. Johnson asked to be allowed to produce an official court reporter to record the proceedings of the hearing because there was litigation either pending or planned in the local district court. He was advised that under the Board procedures no outside recording devices were permitted and that he has opportunity to request the Region for a copy of the official transcript of this hearing.

Mr. Johnson also requested that he be permitted to introduce Ms. Phyllis Bamberger an affiliate in the Legal Aide Division as co-counsel and this was also denied principally on the basis that the panel felt that Mr. Johnson could sufficiently represent Mr. Sheppard; Mr. Sheppard, himself, agreed that Mr. Johnson should act as his counsel if he had to make a choice. It was not the panel's belief that they were being arbitrary in this respect rather that they felt that with the small room in which these hearings were held and the possible introduction of voluntary witnesses, that the limited space would preclude too many people in the hearing and for this reason rather than for any substantive purpose the panel felt that the normal procedures of restricting the hearing to those absolutely necessary should be followed.

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Mr. Johnson reported that he had requested the Regional Commissioner to issue a subpoena for one Mr. S. W. Haley, a Correctional Counselor from the State Facility at Clinton and also to require the production of prison records from that facility which he felt would be germane to the hearing. He advised the panel that the Regional Commissioner had denied his request for a subpoena for Mr. Haley and/or the records and when asked by the panel whether he believed that Mr. Haley's presence and/or the records were so important to his case, did he desire to request a continuance. He stated that he did not because under the circumstances with Mr. Sheppard already enrolled in college and hopefully to return to his scholastic program as soon as possible he did not want to risk delaying the hearing until the next docket.

REVIEW OF CHARGES: Charge #1: Leaving District without permission. On or about October 18, 1974 Sheppard absconded from supervision in the middle district of Florida according to a letter from U.S.P.O. Donald R. Falkenberg to Chief USPO John T. Connally dated December 3, 1974. Subject admits this charge. He says that he originally was released to Tampa but that his house was destroyed shortly after his release on parole. He then engaged property at St. Petersburg Beach in Florida and rented an apartment there and went to his P.O. in Tampa and told him about the change. He was told that he had to wait until there was clearance made with the parole officer in the St. Petersburg area and that the Tampa office would approve it if the St. Petersburg office would likewise accede. He states that he got the approval and went to St. Petersburg Beach and for the first time met P.O. Falkenberg. He states that the latter was quite upset about his place of residence because reportedly it was close to an area where there was drug traffic; and he ordered Sheppard to find a new place within 2 days and also to have steady employment. Sheppard states that faced with this ultimatum and being frustrated because of his lack of success in Tampa he decided to risk punitive action by staying in his apartment and follow through with his plan to get a job as a cab driver. Because of his ex-convict status he was not able to get his license at once, although his prospective employer was trying to get the licensing ~~and~~ to make an exception in this case and when this was delayed and the fact that he was running out of money he states that he left during the first part of October having borrowed money from a family friend to buy an automobile and went to Mobile where he met another family friend who was in the recording business and who had recently produced a musical tape. Because Sheppard has a sister in Manhattan who is a partner in a production company dealing in recordings he decided to see if he could ~~not~~ take advantage of that situation to come to New York and to negotiate some sort of a deal whereby the tape would be produced and he would get enough money in order for him to return to Florida and take up where he left off and he hoped to do this before his absence was discovered.

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Name Lyman Sheppard

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VIOLATION CHARGE # 2: Attempted robbery (2nd degree). On December 19, 1974 Sheppard was sentenced to four years in the custody of the New York Department of Correctional Services upon his pleading guilty to a charge of attempted robbery 2nd degree. It is alleged that on October 18, 1974 he attempted to rob a Burger King restaurant in Manhattan, New York and on October 21, 1974, in the Superior Court for New York County he pled guilty to this offense according to USPO Donald R. Falkenberg in his letter dated December 27, 1974. Sheppard admits this offense. He states that having arrived in New York he was unable to consummate an arraignment whereby he could have the aforementioned tape produced. He was unable to get work although he went to several agencies hiring temporary type of labor, and he already amassed three parking tickets on his automobile as it ~~was~~ ^{was} the streets of New York City. He realized that he was subject to prosecution for this and that this might reveal the fact that he was a parole violator and he would be facing violation charges. He says that he believed that violation was imminent; accordingly, in his desperation he decided to rob a Burger King restaurant because he felt that any money he might gain would be less of a problem to a large corporation than if he was to rob an individual proprietor. The record indicates that he admits that he had a twenty-two caliber gun in his possession when he approached the girl behind the desk and he ordered her to give him money. At the same time there were two detectives eating in the restaurant and noticed that he was attempting a holdup and they grappled with him during which time his gun was discharged. No one was injured in the altercation although he was then found to have some twenty-two rounds of ammunition on his person. He states that he originally got this gun in Tampa for his own protection and that he was carrying it around with him most of the time realized that this too was in violation of his parole and that he had no intent of hurting anybody with the gun as far as the robbery was concerned but did believe that it might come in handy if he had to discourage any would be pursuers. No money was gleaned from the robbery and two days after he was arrested he pled guilty to the attempted robbery receiving a four year sentence about two months later on December 17, 1974. Also, he was charge with attempted grand larceny, possession of a deadly weapon, and reckless endangerment and resisting arrest but there is no indication that he was sentenced seperatley to any of these charges. He is remorseful for what he has done as he looks in retrospect, he says that were he not so desperate for money and so worried about what his parole status would be that he would not have succumbed to his feeling that he had to leave New York as quickly as possible before he was detected as a possible violator.

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FINDINGS OF FACT: The panel finds as a fact that subject violated his parole as charged as indicated below.

Charge #1: Leaving the district without permission. Basis: Your admission to the examiner panel.

Charge #2: Attempted robbery(2nd degree). Basis: Your admission to the panel and the fact that you were sentenced to a four year term in the New York State Institution on December 19, 1974.

Community Resources and Parole Risks: When Sheppard was released to parole from Tallahassee it was to an approved plan following his failure to negotiate successfully a stay in a half-way house. His overall plan was to go to school and to continue his education using his GI-Bill Benefits and he was to live with relatives. He stayed with these relatives for some three weeks at which time he moved to his own arraignment and was working as a cab driver. He found it difficult to maintain acceptable social acquaintances in Tampa and because of the type of culture both drug and delinquent that he found in that city, was hoping to leave as soon as possible and this was impelled when the house he was living in was destroyed. It was then that he decided to go to St. Petersburgs Beach where he rented an apartment and where he tried to resume his occupation as a cab driver. He apparently was working rather regularly in Tampa as a cab driver as he indicates it was a seven day a week, fourteen hour a day job and that it actually was so much for him that once when he refused a call, he had to find a job with another cab company. His plans for the future have now been solidified to a considerable extent. As reported he has served some twenty four months or more in a state correctional institution on a robbery charge, during which time he has become involved, actively, in the collegiate program of the Clinton Community College in Plattsburg, N.Y.. It is noted that the compelling reason for the local authorities to grant him parole was because of his outstanding record of achievement, scholastically, and he reports that he has now amassed some thirty-seven credits towards his Associate Degree in Science which he hopes to receive within a years time and go on to major at a university in Marine Biology with a secondary thrust in Spanish. He states, and this is verified in the record, that he has GI-Bill Benefits which will enable him to go to school full time should this be necessary, he has also receiving grants both State and Federal which will cover his tuition as provided in the program that he has been in at the State institution. A Mr. Peter Smith, who is a general contractor in the Plattsburg area, and who rents apartments to students on a semester basis has come forward with a verified offer of not only residence but of employment in his contracting business. Sheppard was granted a parole on 12-15-76 to what was called basically an approved plan involving his school program and was turned over, of course, to the Federal detainer lodged against him. He will be under State supervision until October 17, 1978, which incidentally accedes the full term date of his YCA sentence and his plan is to stay in the Plattsburg/New York area until he finishes Community College and then take out his options as to future education. His counsel urges that the Commission

UNITED STATES PAROLE COMMISSION
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Name Lyman T. Sheppard Reg. No. 37282-115
Panel _____ Hearing Date _____
Type of hearing Revocation Institution _____

Page 5.

seriously consider allowing Sheppard to fulfill this scholastic goals as the record verifies the fact that he has a 4.0 average and has made the deans list at the Community College as evidenced by a letter in the file.

EVALUATION: The panel is concerned with several major areas in attempting to reach its decision. It recognizes that Sheppard's prior history of adjustment up till the time that he was committed to the State institution was not good. It notes that at his first release from Federal confinement he was unable to adjust to the rules of the Community Treatment Center, but he explains this by saying, that he was mistakenly entered into the drug program of the Goodwill Suncoast Program in Tampa and later when he was transferred over to the transitional phase felt that he was looked upon as a constant objector to whatever goals the house had for him. He felt that his difficulty there was unavoidable and there is some indication that there was substance to his arguments since the record would indicate that he was reparaoled almost immediately after his original date was retarded this time to an approved plan. There is some indication that subject has had emotional problems in the past and he says that this is true because it goes back to the time of his childhood, particularly with his father's suicide, and the fact that there are eight siblings in the family which at that time was hard pressed to provide emotional support and the care that they all needed. He seem to have overcome this particular weakness in his make-up and counsel indicated that there is information in the records at the Clinton Correctional Facility that would indicate he has matured considerably. Sheppard himself says that he was in Quasi counselling while at Clinton and the panel itself notes that Mr. Haley, the erstwhile Correctional Counsellor, who was not subpoenaed, states in his letter of October 14, 1976, that in his opinion Lyman has undergone significant personal growth while incarcerated and has learned to direct his energies towards viable self improvement programs. This he has done despite numerable obstacles and is lauded because of his consistency in sticking to his program, particularly as a full time student. Sheppard, himself, has had a good institutional experience at Clinton having a very satisfactory conduct record, also working as a clerk in the hospital where he became acquainted with a Doctor Reyes who has been able to help him in understanding his past and more particularly what the future will hold for him as far as psychological and psychiatric considerations are concerned. Buttressing this belief that subject has now gotten it all together are the statements of his sisters who appeared in his behalf and who have been in touch with him throughout his sojourn at Clinton. They see him, generally, as much more objective now and more realistic believing he has changed considerable, is a stronger person with a very improved attitude and the family now is in a better position to provide emotional support than it was some two or three years ago when Sheppard seems have been undergoing the low point of his adjustment.

UNITED STATES PAROLE COMMISSION
HEARING SUMMARY

Name Lyman T. Sheppard Reg. No. 37289-115

Panel _____ Hearing Date _____

Type of hearing Revocation Institution _____

Page 6.

The panel believes that there is no alternative but to revoke parole on the basis of the admissions and in looking at the reparole guidelines has placed the subjects violation behavior in new criminal conduct of greatest severity because of the fact that the weapon was discharged in the commission of a robbery. It is also giving Sheppard credit for some 27 months of continuous state and federal custody and although the reparole guidelines indicate no maximum time because of the greatest category does note that there is a customary range of at least 48 months. The panel is constrained to go below the guidelines at this point in making its decision because it notes that there is no prior history of violence in Sheppards background. The gun which was used in the commission of the offense was not actually intended to be fired; it was actually discharged during the struggle when his captives were trying to subdue him. He has achieved an outstanding record while in state confinement; has a solid and viable release plan, particularly as it pertains to his schooling. Panel notes that he will be under dual supervision, not only to the State authorities but to Federal as well, and that the State supervision time will go some 6 months beyond the Federal maximum date which means that there will be considerable period of supervision under which Sheppard's progress can be checked not only by a Federal parole officer but by the State authorities as he follows through in his program. The panel is likewise impressed by what appears to be the decision of the State to parole Mr. Sheppard on the basis of his accomplishments rather than the fact that there was a detainer outstanding, believes that on balance there is justification for rendering a decision outside the guidelines.

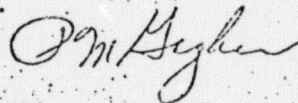
TENTATIVE DECISION: Revoke parole and reparole effective March 15, 1977 to an approved plan.

REASONS FOR REVOCATION: Charge #1: Leaving the district without permission.

Basis: Your admission to the examiner panel. Charge #2: Attempted robbery (2nd degree).

Basis: Your admission to the panel and the fact that you were sentenced to a four year term in the New York State Institution on December 19, 1974

I hereby certify the foregoing to be a true and correct transcript of the recording made of the interview at the time, place and on the occasion indicated.



No information regarding this prisoner will be discussed with any person other than authorized representative of the Department of Justice.

UNITED STATES DEPARTMENT OF JUSTICE
United States Parole Commission
Washington, D. C. 20537



Notice of Action

Name Lyman T. Sheppard
Register Number 37289-115 Institution MCC, NY

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Revoke parole.

(Reasons for continuance or revocation) (Conditions or remarks)

REASONS: Charge #1: Leaving the district without permission.
Basis: Your admission to the examiner panel.
Charge #2: Attempted robbery (2nd degree).
Basis: Your admission to the panel and the fact that you were sentenced to a four year term in the New York State Institution on December 19, 1974.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your counselor, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your counselor, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

- A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Commissioner.
- B. Decision of the National Commissioners when referred to them for reconsideration. Appeal may be made to the Regional Commissioner.
- C. Decision of the Regional Commissioner. Appeal may be made to the National Appeals Board.
- D. Decision of National Commissioners in cases where they assumed original jurisdiction. Appeal may be made to the entire Commission.
- E. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

Jan 24, 1977

Northeast

nlc

(Date Notice sent)

(Region) (NAB) (Nat. Dir)

(Docket Clerk)

COMMISSION COPY

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UNITED STATES DEPARTMENT OF JUSTICE

United States Parole Commission
Washington, D. C. 20537

Notice of Action

Name Lyman T. Sheppard
Register Number 37289-115 Institution MCC, NY

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

CONTINUE FOR REGULAR REVIEW HEARING IN NOVEMBER, 1977.

(Reasons for continuance or revocation) (Conditions or remarks)

REASONS: Your parole supervision history has been rated as negative because of your poor response to parole supervision in Florida and new criminal conduct in New York. Your new criminal conduct has been classified as greatest severity because a weapon was discharged during commission of a felony and you had multiple rounds of live ammunition in your possession. You have been in state and federal custody as a result of your violation behavior for a total of 27 months. Reparole guidelines (23 C.F.R. 2.21) indicate a customary range of 48 or more months to be served before re-release. After review of all relevant factors and information presented, a decision below the guidelines appears warranted because you have been

(continued)

Appeal's recorders You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your correctional or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this notice was sent.

Appeal's procedure You have the right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your correctional or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this notice was sent.

- A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Commissioner.
- B. Decision of the National Commissioners when referred to them for reconsideration. Appeal may be made to the Regional Commissioner.
- C. Decision of the Regional Commissioner. Appeal may be made to the National Appeals Board.
- D. Decision of National Commissioners in cases where they assumed original jurisdiction. Appeal may be made to the entire Commission.
- E. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your Institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

Jan 24, 1977

Northeast

mlc

(Date Notice sent)

(Region) (NAB) (Nat. Dir)

(Docket Clerk)

COMMISSION COPY

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UNITED STATES DEPARTMENT OF JUSTICE
United States Parole Commission
Washington, D. C. 20537

Notice of Action

Name Lyman T. Sheppard
Register Number 37289-115 Institution MCC, NY

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

(Reasons for continuance or revocation) (Conditions or remarks)

Page 2

continuously confined for 27 months with good adjustment. Your re-parole at this time would promote disrespect for the paroling process.

Appeal's procedure: You have a right to appeal a decision as shown below. Please be aware that your responsibility which others cannot perform for you, namely for that purpose may be excluded from your consideration, as the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this notice was sent.

Appeal's procedure: You have a right to appeal a decision as shown below. Please be aware that your responsibility which others cannot perform for you, namely for that purpose may be excluded from your consideration, as the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this notice was sent.

- A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Commissioner.
- B. Decision of the National Commissioners when referred to them for reconsideration. Appeal may be made to the Regional Commissioner.
- C. Decision of the Regional Commissioner. Appeal may be made to the National Appeals Board.
- D. Decision of National Commissioners in cases where they assumed original jurisdiction. Appeal may be made to the entire Commission.
- E. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal may be made to the National Appeals Board.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

Jan 24, 1977

(Date Notice sent)

Northwest

(Region) (NAB) (Nat. Dir)

mlc

(Docket Clerk)

COMMISSION COPY

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Q

PRIOR PROVISIONS OF
YOUTH CORRECTIONS ACT

§ 5005. Youth Correction Division

There is created within the Board of Parole a Youth Correction Division. The Attorney General shall from time to time designate members of the Board of Parole to serve on said Division as the work requires. The Attorney General shall from time to time designate one of the members of the Division to serve as Chairman and delegate to him such administrative duties and responsibilities as may be required to carry out the purposes of this chapter.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086.

§ 5006. Definitions

As used in this chapter—

- (a) "Board" means the Board of Parole;
- (b) "Division" means the Youth Correction Division of the Board of Parole;
- (c) "Bureau" means the Bureau of Prisons;
- (d) "Director" means the Director of the Bureau;
- (e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;
- (f) "Committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter;
- (g) "Treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;
- (h) "Conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086.

§ 5007. Duties of members; meetings

The Division shall hold stated meetings to consider problems of treatment and correction, to consult with, and make recommendations to, the Director with respect to general treatment and correction policies for committed youth offenders, and to enter orders directing the release of such youth offenders conditionally under supervision and the unconditional discharge of such youth offenders, and take such further action and enter such other orders as may be necessary or proper to carry out the purposes of this chapter.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086.

§ 5010. Sentence

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter;

§ 5011. Treatment

Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.

§ 5014. Classification studies and reports

The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Division a report of its findings with respect to the youth offender and its recommendations as to his treatment. At least one member of the Division shall, as soon as practicable after commitment, interview the youth offender, review all reports concerning him, and make such recommendations to the Director and to the Division as may be indicated.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.

§ 5015. Powers of Director as to placement of youth offenders

(a) On receipt of the report and recommendations from the classification agency the Director may—

(1) recommend to the Division that the committed youth offender be released conditionally under supervision; or

(2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or

(3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088.

§ 5016. Reports concerning offenders

The Director shall cause periodic examinations and reexaminations to be made of all committed youth offenders and shall report to the Division as to each such offender as the Division may require. United States probation officers and supervisory agents shall likewise report to the Division respecting youth offenders under their supervision as the Division may direct.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1033.

§ 5017. Release of youth offenders

(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

§ 5018. Revocation of Division orders

The Division may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1039.

§ 5020. Apprehension of released offenders

If, at any time before the unconditional discharge of a committed youth offender, the Division is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility any member of the Division may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youth offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given an opportunity to appear before the Division or a member thereof. The Division may then or at its discretion revoke the order of conditional release.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1039.

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YOUTH CORRECTIONS ACT AS AMENDED

Ch. 402 FEDERAL YOUTH CORRECTIONS 18 § 5006

CHAPTER 402.—FEDERAL YOUTH CORRECTIONS ACT

Sec.

- 5005. Youth correction decisions.
- 5006. Definitions.
- 5010. Sentence.
- 5011. Treatment.
- 5012. Certificate as to availability of facilities.
- 5013. Provision of facilities.
- 5014. Classification studies and reports.
- 5015. Powers of Director as to placement of youth offenders.
- 5016. Reports concerning offenders.
- 5017. Release of youth offenders.
- 5018. Revocation of Commission orders.
- 5019. Supervision of released youth offenders.
- 5020. Apprehension of released offenders.¹
- 5021. Certificate setting aside conviction.
- 5022. Applicable date.
- 5023. Relationship to Probation and Juvenile Delinquency Acts.
- 5024. Where applicable.
- 5025. Applicability to the District of Columbia.
- 5026. Parole of other offenders not affected.

¹ So in original. Item does not conform to section catchline.

§ 5005. Youth correction decisions

The Commission and, where appropriate, its authorized representatives as provided in section 4203(c), may grant or deny any application or recommendation for conditional release, or modify or revoke any order of conditional release, of any person sentenced pursuant to this chapter, and perform such other duties and responsibilities as may be required by law. Except as otherwise provided, decisions of the Commission shall be made in accordance with the procedures set out in chapter 311 of this title.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, and amended Mar. 15, 1976, Pub.L. 94-233, § 3, 90 Stat. 231.

§ 5006. Definitions

As used in this chapter—

- (a) "Commission" means the United States Parole Commission;
- (b) "Bureau" means the Bureau of Prisons;
- (c) "Director" means the Director of the Bureau of Prisons;
- (d) "youth offender" means a person under the age of twenty-two years at the time of conviction;
- (e) "committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to sections 5010(b) and 5010(c) of this chapter;

Complete Judicial Constructions, see Title 18, U.S.C.A.

(f) "treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders; and

(g) "conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1086, and amended Mar. 15, 1976, Pub.L. 94-233, § 4, 90 Stat. 231.

§§ 5007 to 5009. Repealed. Pub.L. 94-233, § 5, Mar. 15, 1976, 90 Stat. 231

§ 5010. Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report to the court its findings.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.

Complete Judicial Constructions, see Title 18, U.S.C.A.

§ 5011. Treatment

Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment. The Director shall from time to time designate, set aside, and adapt institutions and agencies under the control of the Department of Justice for treatment. Insofar as practical, such institutions and agencies shall be used only for treatment of committed youth offenders, and such youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment. Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.

§ 5012. Certificate as to availability of facilities

No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided. Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.

§ 5013. Provision of facilities

The Director may contract with any appropriate public or private agency not under his control for the custody, care, subsistence, education, treatment, and training of committed youth offenders the cost of which may be paid from the appropriation for "Support of United States Prisoners". Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087.

§ 5014. Classification studies and reports

The Director shall provide classification centers and agencies. Every committed youth offender shall first be sent to a classification center or agency. The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. In the absence of exceptional circumstances, such study shall be completed within a period of thirty days. The agency shall promptly forward to the Director and to the Commission a report of its findings with respect to the youth offender and its recommendations as to his treatment. As soon as practicable after commitment, the youth offender shall receive a parole interview.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1087, and amended July 17, 1970, Pub.L. 91-339, § 1, 84 Stat. 437; Mar. 15, 1976, Pub.L. 94-233, § 6, 90 Stat. 231.

Complete Judicial Constructions, see Title 18, U.S.C.A.

§ 5015. Powers of Director as to placement of youth offenders

(a) On receipt of the report and recommendations from the classification agency the Director may—

- (1) recommend to the Commission that the committed youth offender be released conditionally under supervision; or
- (2) allocate and direct the transfer of the committed youth offender to an agency or institution for treatment; or
- (3) order the committed youth offender confined and afforded treatment under such conditions as he believes best designed for the protection of the public.

(b) The Director may transfer at any time a committed youth offender from one agency or institution to any other agency or institution.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.

§ 5016. Reports concerning offenders

The Director shall cause periodic examinations and reexaminations to be made of all committed youth offenders and shall report to the Commission as to each such offender as the Commission may require. United States probation officers and supervisory agents shall likewise report to the Commission respecting youth offenders under their supervision as the Commission may direct.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.

§ 5017. Release of youth offenders

(a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.

(b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of

Complete Judicial Constructions, see Title 18, U.S.C.A.

Ch. 402 FEDERAL YOUTH CORRECTIONS 18 § 5021

the maximum sentence imposed, computed uninterruptedly from the date of conviction.

(e) Commutation of sentence authorized by any Act of Congress shall not be granted as a matter of right to committed youth offenders but only in accordance with rules prescribed by the Director with the approval of the Commission.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1088, and amended Mar. 15, 1976, Pub.L. 94-233, §§ 7, 9, 90 Stat. 232.

§ 5018. Revocation of Commission orders

The Commission may revoke or modify any of its previous orders respecting a committed youth offender except an order of unconditional discharge.

Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.

§ 5019. Supervision of released youth offenders

Committed youth offenders permitted to remain at liberty under supervision or conditionally released shall be under the supervision of United States probation officers, supervisory agents appointed by the Attorney General, and voluntary supervisory agents approved by the Commission. The Commission is authorized to encourage the formation of voluntary organizations composed of members who will serve without compensation as voluntary supervisory agents and sponsors. The powers and duties of voluntary supervisory agents and sponsors shall be limited and defined by regulations adopted by the Commission. Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended Mar. 15, 1976, Pub.L. 94-233, § 9, 90 Stat. 232.

§ 5020. Apprehension of released offenders

If, at any time before the unconditional discharge of a committed youth offender, the Commission is of the opinion that such youth offender will be benefited by further treatment in an institution or other facility the Commission may direct his return to custody or if necessary may issue a warrant for the apprehension and return to custody of such youthful offender and cause such warrant to be executed by a United States probation officer, an appointed supervisory agent, a United States marshal, or any officer of a Federal penal or correctional institution. Upon return to custody, such youth offender shall be given a revocation hearing by the Commission.

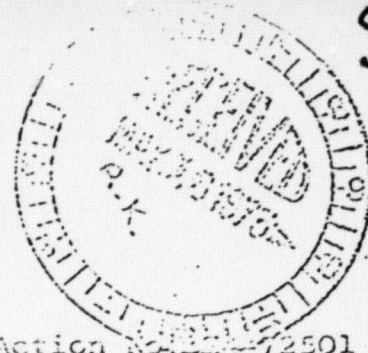
Added Sept. 30, 1950, c. 1115, § 2, 64 Stat. 1089, and amended July 17, 1970, Pub.L. 91-339, § 2, 84 Stat. 437; Mar. 15, 1976, Pub.L. 94-233, § 8, 90 Stat. 232.

§ 5021. Certificate setting aside conviction

(a) Upon the unconditional discharge by the Commission of a committed youth offender before the expiration of the maximum sentence

Complete Judicial Constructions, see Title 18, U.S.C.A.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION



DONALD DUNKIN,

Petitioner,

v.

Civil Action No. 72501

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER
GRANTING MOTION TO VACATE

Petitioner DONALD DUNKIN pleaded guilty on January 24, 1974 to one count of possession of cocaine with intent to distribute. 21 U.S.C. § 841(a)(1). On April 26, 1974, petitioner was sentenced to an indeterminate sentence under the provisions of the Federal Youth Corrections Act. 18 U.S.C. § 5010(b). On September 10, 1974, this Court received a Motion to Vacate Sentence from petitioner.

One of the claims raised by petitioner is that he was not fully aware of the consequences of his guilty plea. Petitioner alleges that before pleading guilty he was informed by his attorney that he would serve not more than six months to one year before being paroled and that his sentence would be reviewed every 90 days by the Parole Board.

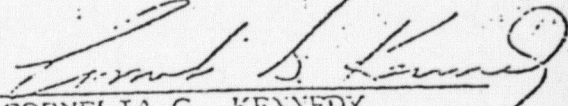
On June 5, 1974, United States Board of Parole Rules and Regulations were published. 39 Fed. Reg. No. 109 June 5, 1974. These rules establish parole guidelines for persons sentenced under the Youth Corrections Act. The guidelines take into account both the nature of the offense and the characteristics of the offender. In this case, the guidelines indicated that petitioner should serve 20-27 months before release. Accordingly, on August 2, 1974, the Parole Board made a determination to continue petitioner's review hearing in January, 1976.

Under the circumstances presented here the Court must agree with petitioner that his plea was involuntary. At the time of petitioner's guilty plea neither he, his attorney, the Assistant United States Attorney, nor the Court were aware of the present conditions for parole under YCA sentences.

The Court believes petitioner's sworn statement as to what he had been advised by his attorney as to frequent periodic review, as well as his belief that his parole would not depend principally on the severity of the crime he committed but rather on his own rehabilitation. See this Court's Opinion in United States of America v. Kerry D. Duggan, Criminal No. 74-80269, concerning the inappropriateness of the present Guidelines in YCA Sentences.

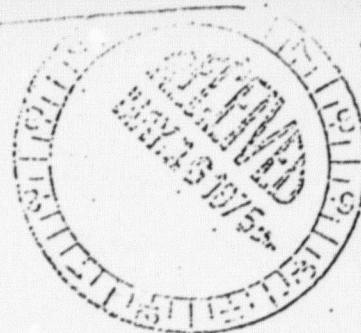
Petitioner was not made "fully aware of the direct consequences" of his guilty plea. Brady v. United States, 397 U. S. 742, 755 (1969). The plea is, therefore, involuntary. See A.B.A. Standards, Pleas of Guilty, § 1.4(c)(ii). The sentence is VACATED so that petitioner may be permitted to plead anew. McCarthy v. United States, 394 U. S. 459 (1969).

IT IS SO ORDERED.


CORNELIA G. KENNEDY
United States District Judge

Dated: May 14, 1975
Detroit, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION



UNITED STATES OF AMERICA,

Plaintiff,

v.

Criminal No. 74-80289

KERRY D. DUGGAN,

Defendant.

OPINION AND ORDER
GRANTING MOTION FOR REDUCTION OF SENTENCE

Defendant KERRY D. DUGGAN pleaded guilty on January 24, 1974, to one count of possession of cocaine with intent to distribute. 21 U.S.C. § 841(a)(1). He was sentenced on April 26, 1974, to an indeterminate sentence under the provisions of the Federal Youth Corrections Act. 18 U.S.C. § 5010(b). On August 26, defendant filed a Motion to Reduce Sentence under Rule 35 of the Federal Rules of Criminal Procedure. ¹

Defendant requests that his sentence be modified to a one-year

regular adult sentence. Defendant cites the new guidelines of the U. S. Board of Parole, 39 Fed. Reg. No. 109, June 5, 1974, which indicate release times for persons sentenced under the Federal Youth Corrections Act based on the nature of the offense and the characteristics of the offender. On August 2, 1974, the Parole Board continued defendant's review hearing until January 1976, in compliance with the guidelines which indicated that defendant should serve 20-27 months before release.

Both the legislative history of the Youth Corrections Act and the caselaw that has interpreted the Act indicate that the purpose of the Act was to provide individualized treatment and supervision for the youthful offender and that a sentence under the Act is not punishment for the committed offense but rehabilitation for the offender. The District of Columbia Circuit Court of Appeals in

¹ Defendant had filed a prior Motion for Reduction of Sentence on July 12, 1974. This Motion was denied on August 1, 1974.

United States v. Waters, 437 F. 2d 722 (1970) vacated a sentence of 4 to 12 years for robbery and 3 to 9 years for assault where the district court "recommended" that the defendant be placed in a youth institution:

The statutory scheme does not envisage this particular combination of rehabilitation and deterrence. It appears that once it is determined that the convicted person is a youth offender (ages 18 to 22), then Congress has decreed priority for the goal of rehabilitation. The objective of deterrence may be taken into account by the trial judge, not by overriding the statute's rehabilitation provisions, but rather by combining them with a sentence exposing the defendant to a maximum term greater than that called for in subsection (b). [Citations omitted] [437 F. 2d at 726]

The Ninth Circuit in holding that monetary penalties are impermissible under a YCA sentencing concluded:

[t]he Federal Youth Corrections Act is an alternative sentencing provision. At the discretion of the judge a youth offender deemed treatable under the Act can be sentenced to treatment rather than punishment under the applicable penalty provision provided by law. A combination of rehabilitative treatment and retributive punishment is not intended and is improper. [United States v. Hayes, 474 F. 2d 965 (9th Cir. 1973)]

The House Report on the Act stated that its purpose was to "cure rather than accentuate the anti-social tendencies that have led to the commission of crime." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 2 U. S. Code Cong. Sess., p. 3983 (1950). The Report notes further that the Act seeks to:

substitute for retributive punishment methods of training and treatment designed to correct and prevent anti-social tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation. [Id., at 3985].

The present guidelines ² of the United States Board of Parole for Youth Correction Act Sentences are inconsistent with this legislative intent. This Court concurs with the recent comments of Judge Richey in United States v. Norcome, 375 F. Supp. 270 (D.C. D.C.197

² The guidelines have been revised in January, 1975. See 40 Fed. Reg. 10976 (Monday, March 10, 1975). The new guidelines with respect to youthful offenders are identical with the originally published guidelines.

These remarkable tables issued by the Department of Justice to assist corrections officials in parole, release, supervision and recommitment of youth offenders appear at 38 Fed. Reg. 31912 (Monday, November 19, 1973), and are attached to this Opinion as Appendix A. The tables show corrections authorities what is the customary range of time to be served before release, assuming a prisoner's good institutional adjustment and program progress. This range of time is directly correlated to the "severity of the offense" for which the youth was committed.

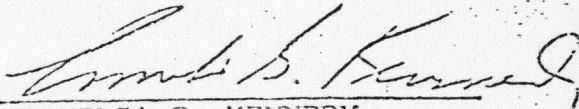
Thus, the tables recommend that where a youth offender, as in Defendant's case, commits armed robbery, a commitment period of 26 to 36 months will serve to insure a "very good" possibility that he will not violate his eventual parole or the conditions of his release where parole is not provided.

To the extent that this table interfaces the decision-making of corrections authorities to whom Congress assigned the responsibility of providing individualized treatment for youth offenders, it makes a mockery of the Federal Youth Corrections Act. Congress did not mandate that the commitment of youths who participated in so-called serious crimes be for a longer period of time than others. Treatment is to be individualized and progress is to be diagnosed in a highly personal manner by the staffs at youth facilities. 18 U.S.C. § 5014. Release, therefore, has to do with adjustment in programs and response to treatment, not with the nature of the crime committed.

These tables are even more incredible when one contemplates the vast expenditures of money for § 5010(e) studies, 18 U.S.C. § 4253 Narcotics Rehabilitation Act studies. Presentence reports by the United States Probation Office, and the like, while agreements are made through the form of regulatory guidelines by the Federal Bureau of Prisons and the United States Board of Parole which relate the time of an offender's incarceration to the seriousness of the offense and not to his or her response to special treatment programs mandated by Congress and the Courts. This gives rise to the inevitable question as to whether the Executive Branch of Government is making a mockery of the laws passed by Congress as well as the sentencing function of the Federal Courts. Such agreements or guidelines governing the release of prisoners are also contrary to the implied and express promises made to all prisoners upon their admission to penal institutions that their prospects for release and parole are not arbitrarily determined but rest upon their efforts to abide by the institutional rules and conform their behavior to acceptable institutional and social standards. See also, Appendix B. Guidelines for Parole Board Decision-Making in NARA cases. [Id., at 274-75 n. 3]

The Court in sentencing defendant did not intend that he be incarcerated for over 20 months before being seriously considered for parole. A reduction of sentence is appropriate here so that the sentence will conform to the Court's intent when it imposed sentence under the Federal Youth Corrections Act. Defendant's Motion for Reduction of Sentence is GRANTED. The present sentence is MODIFIED. Defendant is placed on probation for a period of two years under the provisions of 18 U.S.C. § 5010(a).

IT IS SO ORDERED.


CORNELIA G. KENNEDY
United States District Judge

Dated: May 14, 1975
Detroit, Michigan

U RULES AND REGULATIONS

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or

aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

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Adult

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
LOW				
Marijuana or soft drugs, simple possession (small quantity, for own use)	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 18 mo.
Misconduct (includes larceny and simple possession of stolen property less than \$1,000)				
Walkaway				
LOW-MODERATE				
Alcohol law violations				
Counterfeit currency (passing/possession less than \$1,000)				
Forgery, fraud (less than \$1,000)	8 to 12 mo.	12 to 18 mo.	15 to 20 mo.	20 to 28 mo.
Immigration law violations				
Income tax evasion (less than \$10,000)				
Selective Service Act violations				
Theft from mail (less than \$1,000)				
MODERATE				
Bribery of public officials				
Counterfeit currency (passing/possession \$1,000 to \$10,000)				
Drugs:				
Marijuana, possession with intent to distribute (less than \$1,000)				
"Soft drugs" possession with intent to distribute (less than \$500)				
Embezzlement (less than \$10,000)				
Firearms Act, possession/purchase/sale (single weapon—not sawed-off shotgun or machine gun)	12 to 18 mo.	16 to 20 mo.	20 to 24 mo.	24 to 32 mo.
Income tax evasion (\$10,000 to \$100,000)				
Interstate transportation of stolen, forged securities (less than \$10,000)				
Mailing threatening communications				
Misprision of felony				
Receiving stolen property with intent to resell (less than \$10,000)				
Smuggling/transporting of Aliens				
Theft, forgery, fraud (\$1,000 to \$10,000)				
Theft of motor vehicle (not multiple theft or for resale)				
HIGH				
Burglary or larceny (other than embezzlement) from bank or post office				
Counterfeit currency (passing/possession \$10,000-\$100,000)				
Counterfeiting (manufacturing)				
Drugs:				
Marijuana, possession with intent to distribute (\$5,000 or more)				
"Soft drugs" possession with intent to distribute (\$500 to \$5,000)				
Embezzlement (\$10,000 to \$100,000)	16 to 20 mo.	20 to 28 mo.	28 to 36 mo.	36 to 44 mo.
Explosives, possession/transportation				
Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons)				
Interstate transportation of stolen, forged securities (\$10,000 to \$100,000)				
Mail Act (no force—commercial purposes)				
Cracked vehicle theft				
Receiving stolen property (\$10,000 to \$100,000)				
Theft, forgery, fraud (\$10,000 to \$100,000)				
VERY HIGH				
Robbery (weapon or threat)				
Drugs:				
"Hard drugs" (possession with intent to distribute/sale) (no prior conviction for sale of "hard drugs")	24 to 36 mo.	36 to 48 mo.	48 to 60 mo.	60 to 72 mo.
"Soft drugs" possession with intent to distribute/sale (over \$5,000)				
Extortion				
Mail Act (force)				
Sexual Act (force)				

§ 2.19 Information considered.

(a) In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report record of earlier probation and parole sentences;

(3) Presentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney; and

(5) Reports of physical, mental, or psychiatric examination of the offender.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
GREATLY				
Aggravated felony (e.g., robbery, sexual act, aggravated assault—weapon fired or personal injury).	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			
Aircraft hijacking.				
Drugs: "Hard drugs" (possession with intent to distribute, sale for profit [prior conviction(s) for sale of "hard drugs"]).				
Explosives (detonation).				
Kidnaping.				
Willful homicide.				

NOTES

1. These guidelines are predicated upon good institutional conduct and program performance.
2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
3. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
4. If an offense behavior involved multiple separate offenses, the severity level may be increased.
5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.

Youth and NARA

[Guidelines for decisionmaking, customary total time served before release (including jail time)]

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor score)							
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)				
LOW								
Marijuana or soft drugs, simple possession (small quantity for own use)	6 to 10 mo.	8 to 12 mo.	10 to 14 mo.	12 to 18 mo.				
Minor theft (includes larceny and simple possession of stolen property less than \$1,000).								
Walkaway								
LOW MODERATE								
Alcohol law violations	8 to 12 mo.	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.				
Counterfeit currency (passing possession less than \$1,000)								
Forgery fraud (less than \$1,000)								
Immigration law violations								
Income tax evasion (less than \$10,000)								
Selective Service Act violations								
Theft from mail (less than \$1,000)								
MODERATE								
Bribery of public officials	9 to 15 mo.	13 to 17 mo.	17 to 21 mo.	21 to 25 mo.				
Counterfeit currency (passing possession \$1,000 to \$19,999)								
Drugs:								
Marijuana, possession with intent to distribute, sale (less than \$5,000)								
"Soft drugs", possession with intent to distribute/sale (less than \$400)								
Embezzlement (less than \$20,000)								
Firearms Act, possession purchase sale (single weapon—not sawed-off shotgun or machine gun)								
Income tax evasion (\$10,000 to \$50,000)								
Interstate transportation of stolen, forged securities (less than \$20,000)								
Mailing threatening communications								
Misprision of felony								
Receiving stolen property with intent to resell (less than \$20,000)								
Smuggling, Transporting of Aliens								
Theft, forgery fraud (\$1,000 to \$19,999)								
Theft of motor vehicle (not multiple theft or for resale)								
HIGH								
Burglary or larceny (other than embezzlement) from bank or post office								
Counterfeit currency (passing possession \$20,000-\$199,999)								
Counterfeiting (manufacturing)								
Drugs:								
Marijuana, possession with intent to distribute, sale (\$5,000 or more)								
"Soft drugs", possession with intent to distribute, sale (\$500 or more)								
Embezzlement (\$20,000 to \$100,000)	12 to 16 mo.	16 to 20 mo.	20 to 24 mo.	24 to 32 mo.				
Explosives, possession transportation								
Firearms Act, possession purchase sale (sawed-off shotgun(s), machine gun(s), or multiple weapons)								
Interstate transportation of stolen, forged securities (\$20,000 to \$100,000)								
Mann Act (no force—commercial purposes)								
Organized vehicle theft								
Receiving stolen property (\$20,000 to \$100,000)								
Theft, forgery, fraud (\$20,000 to \$100,000)								

RULES AND REGULATIONS

Offense characteristics: severity of offense behavior (examples)	Offender characteristics: parole prognosis (salient factor scores)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
VERY HIGH				
Robbery (weapon or threat).....	20 to 27 mo.....	27 to 34 mo.....	34 to 41 mo.....	41 to 48 mo.....
Drugs:.....				
"Hard drugs" (possession with intent to distribute sale) (no prior conviction for sale of "hard drugs").....				
"Soft drugs", possession with intent to distribute sale (over \$5,000).....				
Extortion.....				
Mann Act (force).....				
Sexual act (force).....				
GREATEST				
Aggravated felony (e.g., robbery, sexual act, aggravated assault)—weapon fired or personal injury.....	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			
Aircraft hijacking.....				
Drugs: "Hard drugs" (possession with intent to distribute sale) for profit (prior conviction(s) for sale of "hard drugs").....				
Espionage.....				
Explosives (detonation).....				
Kidnaping.....				
Willful homicide.....				

NOTES

- These guidelines are predicated upon good institutional conduct and program performance.
- If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.
- If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
- If an offense behavior involved multiple separate offenses, the severity level may be increased.
- If a continuance is to be given, allow 30 d (1 mo) for release program provision.
- "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.

SALIENT FACTOR SCORE

Case name _____ Register No. _____

Item A. No prior convictions (adult or juvenile) = 2
One or two prior convictions = 1
Three or more prior convictions = 0

Item B. No prior incarcerations (adult or juvenile) = 2
One or two prior incarcerations = 1
Three or more prior incarcerations = 0

Item C. Age at first commitment (adult or juvenile) 18 years or older = 1
Otherwise = 0

Item D. Commitment offense did not involve auto theft = 1
Otherwise = 0

Item E. Never had parole revoked or been committed for a new offense while on parole = 1
Otherwise = 0

Item F. No history of heroin or opiate dependence = 1
Otherwise = 0

Item G. Has completed 12th grade or received GED (prior to this commitment) = 1
Otherwise = 0

Item H. Verified employment (or full-time school attendance) for a total of at least 6 months during the last 2 years in the community = 1
Otherwise = 0

Item I. Release plan to live with spouse and/or children = 1
Otherwise = 0

Total score _____

§ 2.21 Parole consideration guidelines.

(a) If revocation is based upon administrative violation(s) only (i.e., violations other than new criminal conduct) the following guidelines shall apply.

Positive supervision history (examples):

- a. No serious alcohol/drug abuse and no possession of weapon(s) [and]
- b. At least 8 months from date of release to date of violation behavior [and]
- c. Positive employment/school record during supervision [and]
- d. Present violation represents first instance of failure to comply with parole regulations of this term

Negative supervision history (examples):

- a. Serious alcohol/drug abuse (e.g., readmittance to hard drugs) or possession of weapon(s) [or]
- b. Less than 8 months from date of release to date of violation behavior [or]
- c. Negative employment/school record during supervision [or]
- d. Negative attitude toward supervision demonstrated by lack of positive efforts to cooperate with parole (aftercare) plan or by repetitious or persistent violations

(b)(1) If a finding is made that the prisoner has engaged in behavior constituting new criminal conduct, the appropriate severity rating for the new criminal behavior shall be calculated. New criminal conduct may be determined either by a new federal, state, or local conviction or by an independent finding by the Commission at revocation hearing. As violations may be for state or local offenses, the appropriate severity level may be determined by analogy with listed federal offense behaviors.

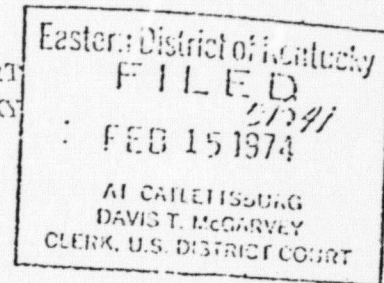
(2) The guidelines for parole consideration specified at 28 CFR 2.20 for the poor parole risk category shall then be applied. The original sentence type (i.e., adult, youth) shall determine the applicable guidelines for the parole violator term. Time served on a new state or federal sentence shall be credited as time in custody.

(c) The above are merely guidelines. A decision outside these guidelines (either above or below) may be made when circumstances warrant. For example, violations of an assaultive nature, or violations by a person with a history

of assaultive conduct or by a person with a history of repeated parole failure may warrant a decision above the guidelines. minor offense(s) (e.g., traffic infractions, disorderly conduct) shall normally be treated under administrative violations.

APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG



CIVIL ACTION NO. 1144

RICHARD T. LOCICERO,

PETITIONER,

VS:

MEMORANDUM OPINION AND ORDER

IRL DAY, Warden,
Federal Youth Center;
NORMAN CARLSON, Director,
U. S. Bureau of Prisons;
WILLIAM E. AMOS, Chairman,
U. S. Board of Parole,

RESPONDENTS.

This case represents a challenge by a federal prisoner to the administration of procedures, exercise of discretion and orders of the United States Parole Board Youth Division which failed to grant

him parole. By Memorandum Opinion and Order filed June 27, 1973, this Court determined that jurisdiction did not exist to review petitioner's eligibility for parole, DiMarco v. Greene, 385 F.2d 556 (6th Cir. 1967), but did accept, under Maddox v. Richardson, 464 F.2d 617, 621 (6th Cir. 1972), the view that United States Courts have the power to review final agency decisions where no other adequate remedy is provided. This Court asserted jurisdiction for "the determination of whether petitioner's particular case was disposed of by the agency without the consideration contemplated by applicable statutes or agency regulations". Counsel was appointed for petitioner. An evidentiary hearing was held November 13, 1973. At another hearing held January 15, 1974, counsel for both parties were put on terms for briefs which have been filed and considered.

The petitioner is Richard T. Iocicero who entered a plea of guilty to the felony crime of receiving stolen bank funds, 18 U.S.C. 2113(c), in the Eastern District of New York at Brooklyn.

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He was sentenced under the provisions of Title 18 U.S.C. §5010(b) as a youth offender. His sentence commenced on July 5, 1972, and he has received proper credit for all jail time. 18 U.S.C. 3568. Because this Court was not the sentencing Court, no attack on the validity of the original sentence could be heard, 28 U.S.C. 2255, and none is asserted.

It is convenient to consider petitioner's arguments in two parts because they arose in that manner, although each is but an aspect of the same basic challenge. First to be considered is whether petitioner's parole review was procedurally like that afforded all youth offenders; and, second, whether the administration of the Youth Offender Act, 18 U.S.C. 5005-5026, is unconstitutionally administered as to petitioner by the Youth Division of the United States Board of Parole (hereinafter "Board").

The evidence establishes that the Board affords each federal prisoner in custody under a Section 5010(b) sentence an automatic

The evidence establishes that the Board affords each federal prisoner in custody under a Section 5010(b) sentence an automatic initial hearing at the place of confinement. The Board's target date for such hearing is three (3) months after the commencement of sentence; in petitioner's case, the hearing was held three (3) months and twelve (12) days after the commencement of his sentence. At this hearing held on October 18, 1972, the Examiner¹. heard the petitioner, considered the Staff Evaluation of Petitioner dated September 18, 1972 and the Classification Summary dated September 16, 1972. The Board acted upon the initial hearing report on petitioner by Order dated January 2, 1973, and set off further

1. By "Examiner" is meant a member of the Youth Division of other Parole Board member or appointed examiner.

consideration for twenty-seven (27) months. Petitioner enlisted the aid of the Fortune Society in New York and that of the Reverend Ansulm Murry, OSB. The Fortune Society, utilizing Board procedures, made application for a headquarters review and submitted favorable letters, including those from institutional staff personnel, suggesting that petitioner was ready for parole and that further confinement would not be beneficial. This occurred in May and June of 1973. The Board's response to these matters was that the materials --furnished did not indicate "new or substantially significant material not already considered in the initial hearing"², and no special review or hearing in Washington was ordered.

Petitioner argues that the Board, upon receiving a request for a special review from the Fortune Society, was under an affirmative duty to make inquiry and, procedurally, request a special progress report on him. It is not necessary to further discuss the merits of this argument,³ since the subsequent interim progress report of October 1973 would contain the evaluations of those in direct supervision of Mr. Locicero and the Board was thereby made aware of the

staff evaluations petitioner sought to have the Board consider. The Board's decision in respect to this review was by Order dated November 27, 1973. A set-off of twenty-one (21) months to the next institutional review was established. Petitioner is now awaiting the lapsing of the set-off period.

2. Interrogatory No. 1, answer by Claude S. Nock, Jr., Youth Division Executive upon his own knowledge and belief, and information contained in the records of the U. S. Board of Parole.
3. No authority is cited for the conclusion that the Board had a duty to contact the institution particularly where no new significant date was furnished justifying a review hearing.

The evidence shows that one sentenced under the Youth Offender Act does not apply for parole as would a regular adult prisoner. The Board procedures provide for automatic review. Further, in the reviews granted petitioner "the complete file of the prisoner was reviewed prior to the issuance of both orders"⁴. (January 2, 1973 and November 27, 1973). No matter has been brought to the attention of this Court suggesting that the petitioner Locicero was denied the benefit of any established procedure of the Board or that the consideration of his case was not in accordance with normal Board practices.

A careful review of the evidence impels the finding that petitioner's major complaint is that he and the Board differ on his suitability for immediate parole. The Congress has seen fit to vest the discretionary power to grant parole to the Board "and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole". 18 U.S.C. 4203(a). The failure of the

Board to give petitioner reasons for its denial of parole does not violate his rights under the Federal Constitution. Scarpa v. Board of Parole, 477 F.2d 278 (5th Cir. 1973); Dorato v. Kerr, 454 F.2d 892 (9th Cir. 1972); Menachino v. Oswald, 430 F.2d 403 (2d Cir. 1970).

The precise answer to petitioner's reliance on claims of deprivation of constitutionally protected rights rests on the fact that his loss of freedom was by lawful order of a United States Court whose judgment has not been overturned. Having been lawfully deprived of his freedom, his quest to be freed through parole does

4. Interrogatory No. 11, Answer by Claude S. Nock, Jr.

not place the petitioner in the same status as one whose freedom, even if tenuous, is sought to be taken from him by the Government. Cf. Morrissey v. Brewer, 408 U.S. 471 (1972). Petitioner cites the First, Fifth and Eighth Amendments as having been violated as to him. No First Amendment question is presented. For a claim to arise under the Fifth Amendment, it would be necessary to suggest that some liberty or property is being taken from him without due process of law. No such showing is made. Petitioner does not state an arguable Eighth Amendment claim for the infliction of cruel and inhuman punishment.

It is petitioner's claim that the Board violates his rights "in that it has arbitrarily established periods of time for certain categories of offenses which must be served prior to the youth offender being considered for any type of parole". Amended Petition, paragraph No. 7. Petitioner's argument is without merit for the reason that no suggestion of arbitrariness has been shown.

On November 19, 1973, the Board caused to be published in the Federal Register, Vol. 38, No. 222, pages 31942 through 31945, certain policy guidelines including at page 31943, "Youth Guidelines for Decision-Making". The format of this statement is to list vertically various offenses in terms of severity of offensive behavior and to indicate offender characteristics horizontally in terms of "Parole Prognosis" based on salient factor scores and upon the assumption that the inmate has shown good institutional conduct and program performance. In terms of risk or Parole Prognosis, that is, Very Good, Good, Fair and Poor, the "Customary Total Time (In Months) Served Before Release (Including Jail Time)" is given as to the examples of crimes rated as to severity. For example, the crime of bribery of public officials is rated as a crime of moderate

accountability. A very good youth offender risk for parole would customarily remain confined for a period of nine (9) to thirteen (13) months; a poor risk would remain confined for a period of twenty-one (21) to twenty-six (26) months. In the same publication the amendment to 28 CFR 2.52(c) states:

"It is to be stressed that these ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good program achievement may be considered for earlier release."

The evidence does not warrant the inference that the publication of general policy statements constitutes an arbitrary classification of periods of time required to be served before a youth offender would be considered for parole. It is simply what it purports to be -- a statement of customary periods of confinement subject to discretionary changes in individual cases made for the purpose of assisting in decision making by the Board.

Petitioner seeks to have his Complaint and Amended Petition considered as a class action under Rule 23, F.R.C.P. It is sought to define the class "as all persons who are unlawfully and unconstitutionally incarcerated by the defendants as a result of denial of parole". Complaint, paragraph No. 3. It is sufficient to reject this contention on the ground that this Court has no warrant to assume that a denial of parole results in either an unlawful or an unconstitutional incarceration. The authority for incarceration for each individual federal prisoner is a judgment of conviction which is subject to appellate review to cure any error that may taint it. Parole is an act of sovereign grace granted in the discretion of the Board upon a highly individualized consideration

of each applicant or person eligible. The denial of parole per se does not violate the Constitution of the United States.

The petitioner has failed to carry the burden of proof as to all issues and, in the opinion of this Court, has failed utterly to raise any circumstance which casts any shadow of impropriety upon the conduct of respondents. Accordingly, judgment will be entered in favor of the respondents and this cause shall be stricken from the docket.

IT IS SO ORDERED this 5 day of February, 1974.

/ s/ H. David Hermansdorfer
H. DAVID HERMANSDORFER, JUDGE

Copied to:

James E. Adkins II
U.S. Attorney

Mailed
2-15-74
7/1/74

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUN 16 1975

No. 74-1631

JOHN P. HEHMAN, Clerk

RICHARD T. LOCICERO,

Petitioner-Appellant,

v.

IRL DAY, Warden, FYC,
NORMAN CARLSON, Director,
-U. S. Bureau of Prisons,

WILLIAM E. AMOS, Chairman,
U. S. Board of Parole,

Respondent-Appellees.

Before: WEICK and MCCREE, Circuit Judges, and CECIL, Senior Circuit
Judge.

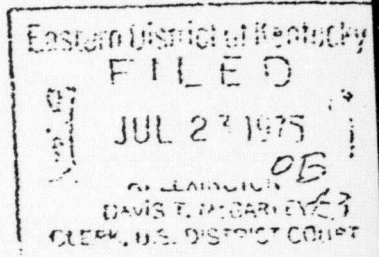
J U D G M E N T

APPEAL from the United States District Court for the Eastern
District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States
District Court for the Eastern District of Kentucky
and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by
this Court that the judgment of the said District Court in this cause be
and the same is hereby affirmed.

No costs taxed.



ENTERED BY ORDER OF THE COURT.

John P. Hehman
Clerk

Issued as Mandate: July 21, 1975

COSTS: NONE

Filing fee.....\$-----

Printing.....\$-----

Total \$-----

Copies to:

James E. Collins II
U.S. Atty.

A True Copy.

Attest:

John P. Hehman

John P. Hehman, Clerk

By

Grace Keller
Chief Deputy

Relevant Sections of The Parole Commission and Reorganization Act

W

Ch. 311

PAROLE

18 § 4206

at the expiration of such sentence less good time deductions provided by law, unless the court which imposed sentence, shall, at the time of sentencing, provide for the prisoner's release as if on parole after service of one-third of such term or terms notwithstanding the provisions of section 4164. This subsection shall not prevent delivery of any person released on parole to the authorities of any State otherwise entitled to his custody.

(g) At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

(h) Nothing in this chapter shall be construed to provide that any prisoner shall be eligible for release on parole if such prisoner is ineligible for such release under any other provision of law.

Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 222.

§ 4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;
subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that

18 § 4206

PRISONS AND PRISONERS

Part 3

there is a reasonable probability that he will commit any Federal, State, or local crime.

Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.

livered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or to the custody of the Attorney General, if the Commission shall so direct.
Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 227.

§ 4214. Revocation of parole

(a)(1) Except as provided in subsections (b) and (c), any alleged parole violator summoned or retaken under section 4213 shall be accorded the opportunity to have—

(A) a preliminary hearing at or reasonably near the place of the alleged parole violation or arrest, without unnecessary delay, to determine if there is probable cause to believe that he has violated a condition of his parole; and upon a finding of probable cause a digest shall be prepared by the Commission setting forth in writing the factors considered and the reasons for the decision, a copy of which shall be given to the parolee within a reasonable period of time; except that after a finding of probable cause the Commission may restore any parolee to parole supervision if:

(i) continuation of revocation proceedings is not warranted; or

(ii) incarceration of the parolee pending further revocation proceedings is not warranted by the alleged frequency or seriousness of such violation or violations;

(iii) the parolee is not likely to fail to appear for further proceedings; and

(iv) the parolee does not constitute a danger to himself or others.

(B) upon a finding of probable cause under subparagraph (1) (A), a revocation hearing at or reasonably near the place of the alleged parole violation or arrest within sixty days of such determination of probable cause except that a revocation hearing may be held at the same time and place set for the preliminary hearing.

(2) Hearings held pursuant to subparagraph (1) of this subsection shall be conducted by the Commission in accordance with the following procedures:

(A) notice to the parolee of the conditions of parole alleged to have been violated, and the time, place, and purposes of the scheduled hearing;

(B) opportunity for the parolee to be represented by an attorney (retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006A) or, if he so chooses, a representative as provided by rules and regulations, unless the parolee knowingly and intelligently waives such representation.

(C) opportunity for the parolee to appear and testify, and present witnesses and relevant evidence on his own behalf; and

(D) opportunity for the parolee to be apprised of the evidence against him and, if he so requests, to confront and cross-examine

adverse witnesses, unless the Commission specifically finds substantial reason for not so allowing.

For the purposes of subparagraph (1) of this subsection, the Commission may subpoena witnesses and evidence, and pay witness fees as established for the courts of the United States. If a person refuses to obey such a subpoena, the Commission may petition a court of the United States for the judicial district in which such parole proceeding is being conducted, or in which such person may be found, to request such person to attend, testify, and produce evidence. The court may issue an order requiring such person to appear before the Commission, when the court finds such information, thing, or testimony directly related to a matter with respect to which the Commission is empowered to make a determination under this section. Failure to obey such an order is punishable by such court as a contempt. All process in such a case may be served in the judicial district in which such a parole proceeding is being conducted, or in which such person may be found.

(b)(1) Conviction for a Federal, State, or local crime committed subsequent to release on parole shall constitute probable cause for purposes of subsection (a) of this section. In cases in which a parolee has been convicted of such a crime and is serving a new sentence in an institution, a parole revocation warrant or summons issued pursuant to section 4213 may be placed against him as a detainer. Such detainer shall be reviewed by the Commission within one hundred and eighty days of notification to the Commission of placement. The parolee shall receive notice of the pending review, have an opportunity to submit a written application containing information relative to the disposition of the detainer, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section to assist him in the preparation of such application.

(2) If the Commission determines that additional information is needed to review a detainer, a dispositional hearing may be held at the institution where the parolee is confined. The parolee shall have notice of such hearing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel as provided in subsection (a)(2)(B) of this section.

(3) Following the disposition review, the Commission may:

- (A) let the detainer stand; or
- (B) withdraw the detainer.

(c) Any alleged parole violator who is summoned or retaken by warrant under section 4213 who knowingly and intelligently waives his right to a hearing under subsection (a) of this section, or who knowingly and intelligently admits violation at a preliminary hearing held pursuant to subsection (a)(1)(A) of this section, or who is retaken pursuant to subsection (b) of this section, shall receive a revocation hearing within ninety days of the date of retaking. The Commission may conduct such hearing at the institution to which he has been returned, and the alleged parole violator shall have notice of such hear-

ing, be allowed to appear and testify on his own behalf, and, unless waived, shall have counsel or another representative as provided in subsection (a)(2)(B) of this section.

(d) Whenever a parolee is summoned or retaken pursuant to section 4213, and the Commission finds pursuant to the procedures of this section and by a preponderance of the evidence that the parolee has violated a condition of his parole the Commission may take any of the following actions:

- (1) restore the parolee to supervision;
- (2) reprimand the parolee;
- (3) modify the parolee's conditions of the parole;
- (4) refer the parolee to a residential community treatment center for all or part of the remainder of his original sentence; or
- (5) formally revoke parole or release as if on parole pursuant to this title.

The Commission may take any such action provided it has taken into consideration whether or not the parolee has been convicted of any Federal, State, or local crime subsequent to his release on parole, and the seriousness thereof, or whether such action is warranted by the frequency or seriousness of the parolee's violation of any other condition or conditions of his parole.

(e) The Commission shall furnish the parolee with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the revocation hearing. If parole is revoked, a digest shall be prepared by the Commission setting forth in writing the factors considered and reasons for such action, a copy of which shall be given to the parolee.

Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.

§ 4215. Reconsideration and appeal

(a) Whenever parole release is denied under section 4206, parole conditions are imposed or modified under section 4209, parole discharge is denied under section 4211(c), or parole is modified or revoked under section 4214, the individual to whom any such decision applies may have the decision reconsidered by submitting a written application to the regional commissioner not later than thirty days following the date on which the decision is rendered. The regional commissioner, upon receipt of such application, must act pursuant to rules and regulations within thirty days to reaffirm, modify, or reverse his original decision and shall inform the applicant in writing of the decision and the reasons therefor.

(b) Any decision made pursuant to subsection (a) of this section which is adverse to the applicant for reconsideration may be appealed by such individual to the National Appeals Board by submitting a written notice of appeal not later than thirty days following the date on which such decision is rendered. The National Appeals Board, upon receipt of the appellant's papers, must act pursuant to rules and regu-

UNITED STATES GOVERNMENT

Memorandum

NORTHEAST REGION

TO : Warden, Metropolitan Correctional
Center, New York, N.Y. 10007

DATE: 12/17/76

FROM : JOSEPH A. NARDOZA, Regional Commissioner, U.S. Parole Commission,
NERO, Philadelphia, Pa. 19113

BY: David E. O'Connor, Post Release Analyst

SUBJECT: SHEPPARD, Lyman Thurkle
Reg. No. 37289-115

Your Institution has been designated by the Bureau of Prisons as the site of Subject's forthcoming revocation hearing. Would you please keep the attached material, along with our Warrant and Warrant Application, as a SEPARATE PACKET to be made available to the Commission Member or Examiner conducting the hearing. After the hearing has been conducted, please incorporate the packet into your institution file.

Additional material will be forwarded for inclusion in above-mentioned packet as soon as received by the Commission.

Enclosures



DOC/rdc

5010-110

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 76-1242-Civ-CA

ROBERT BRYANT MC KAY

v.

ORDER OF DISMISSAL

UNITED STATES OF AMERICA

I.

Robert Bryant McKay has filed a Petition for a Writ of Habeas Corpus pursuant to Title 28, U.S.C. §2241(E)(3) attacking his confinement in the Federal Correctional Institution at Miami, Florida as being violative of the spirit and provisions of the Youth Corrections Act (Y.C.A.)¹ and the Fourteenth Amendment to the United States Constitution.

On December 18, 1975, pursuant to a Rule 20 Plea of guilty to the offense of embezzlement and conversion to his own use of . . . monies of the First Bank and Trust Company, Providence, Rhode Island, in violation of Title 18, U.S.C. §656, petitioner was

committed to the custody of the Attorney General for treatment and
in accordance with Title 18, U.S.C. §5010(b)², until discharged
by the Board of Parole as provided
in Title 18, U.S.C. §5017(c).³

II.

Following an initial parole hearing conducted on April 6, 1976
at the Federal Correctional Institution in Tallahassee, Florida;
the United States Board of Parole on April 20, 1976, issued an order

¹Title 18, U.S.C. §§5005-5016.

²(1) If the court shall find that a convicted person is a youth
offender, and the offense is punishable by imprisonment under applic-
able provisions of law other than this subsection, the court may, in
lieu of the penalty of imprisonment otherwise provided by law, sen-
tence the youth offender to the custody of the Attorney General for
treatment and supervision pursuant to this chapter until discharged
by the Division as provided in section 5017(c) of this chapter; or

³(c) A youth offender, committed under §5010(b) of this chapter
shall be released conditionally under supervision on or before
the expiration of four years from the date of his conviction and shall
be discharged unconditionally on or before six years from the date
of his conviction.

denying parole and continued petitioner's incarceration with an institutional review hearing scheduled for February, 1977.¹ The reasons for the parole denial were stated as follows:

"Your offense behavior has been rated as moderate severity. You have a salient factor score of 8. You have been in custody a total of 3 months. Guidelines established by the Board for youth cases which consider the above factors indicate a range of 13 to 17 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted."

Such denial was affirmed on May 24, 1976.

Petitioner contends that the use of decision-making guidelines by the U. S. Board of Parole in the determination of when a prisoner sentenced under the Youth Corrections Act shall be released on parole is violative of the purpose of the statute. More specifically, he contends that the Board's consideration of offense severity as a factor in the abovementioned parole decision was contrary to rehabilitative purposes of the Y. C. A. and its provisions for the allowance

of release at any time.

III.

Guidelines taken by themselves are not determinative. The format of the

¹There is no indication that the Board is not following the requirement of periodic reports under Title 18, U.S.C. §5015.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration. (b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established for cases with good institutional adjustment and program progress. (c) It is to be stressed that these ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release. (d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

tables is to list vertically various offenses in terms of severity and to indicate horizontally offender characteristics in terms of "parole prognosis" based on "salient factor scores." Thus, use of the tables does not preclude individualized consideration of each prisoner's case for the reason that consideration of the offender's individual characteristics and institutional performance is clearly mandated thereby. The guidelines are simply statements of customary periods of confinement which are subject to discretionary changes in individual cases and are not arbitrary classifications of periods of time that a youth offender must serve before he is eligible for parole. In this regard, the court in Wiley v. United States Board of Parole, 380 F.Supp. 1194 (M.D. Pa. 1974) specifically stated as follows:

"It should be emphasized that these guidelines were promulgated as just that -- merely guidelines, and the Board is free to render a decision either above or below the guideline range where in the opinion of the Board the circumstances warrant. For example, the Board may reach a decision below or above the guidelines if the prisoner has an exceptionally good institutional record, or if the Board is impressed by the clinical psychologist's prognosis for the inmate's future behavior. The Board is also free to consider the inmate's score in the inmate. Thus, while the guidelines structure the discretion of the Board within the broad statutory mandate, the Board remains free to exercise its discretion in its merits. The court holds that the Board's published guidelines for parole decision-making are consistent with the general statutory criteria for parole embodied in 18 U.S.C.A. §§4202, 4203, and hence are valid." 10. at 1197.

IV.

Moreover, the Board of Parole uses separate sets of guideline tables for adult and youth sentences. Although the offense severity groupings and salient factor items are the same, the time ranges in the youth guidelines are shorter than those in the adult guidelines.

Petitioner's contention that the youth guidelines violate the V. C. A. is premised on the theory that consideration of the seriousness of the petitioner's crime, which is represented by the vertical scale of the guidelines, is in conflict with the rehabilitative purpose of the statute. However, in support of this contention, petitioner does not rely upon any express statutory provision prescribing the appropriate V. C. A. parole criteria. He relies, rather, on general references to the rehabilitative purposes of the V. C. A. in the legislative history of the Act. See Dorszynski v. United States, 413 U. S. 424 (1974). This Court is cognizant that in Mayet v. Sicler, 403 F.Supp. 1243 (M. D. Penn. 1975) it was held that the Parole Board could not consider the youth guidelines in determining a youth offender's eligibility for parole. However, the court in Mayet, supra, specifically referred to the case of LoCicero v. Day, Civil Action No. 1144 (E.D. Ky. 2/15/74) in which case the court reached an opposite conclusion.

"The Government has cited LoCicero v. Day, at al., Civil No. 1144 (E.D. Kentucky, February 15, 1974) as authority that the Board's use of the guidelines in question is not"

V.

There is no textual support in the V. C. A. for petitioner's contention that offense severity is an illegal parole consideration.¹ In this regard, the relevant statutory provisions state no parole criteria at all. Therefore, since Congress did not attempt to restate the paroling criteria when it passed the V. C. A., it seems unlikely

5017. Release of youth offenders. (a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division. (b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release. (c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

that it intended to radically alter the existing criteria. Accordingly, this Court must conclude that the Board of Parole properly followed the criteria of the general parole statute which authorizes the Board to release the prisoner when it appears that "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws and if in the opinion of the Board such release is not incompatible with the welfare of Society. . . ." Title 18, U.S.C. §4202(a). In Battle v. Norton, 365 F.Supp. 925 (D. Conn. 1973) it was held that the Board's reliance upon the guidelines was fully consistent with the abovementioned statutory criteria and did not constitute an abuse of discretion. See also, Wiley, supra; Lupo v. Norton, 371 F.Supp. 156 (D. Conn. 1974). This Court feels constrained to agree with the reasoning in Battle, supra that if the guidelines were used, severity of the offense was not relied on by the Board to the exclusion of all other factors since the guideline table requires consideration of offender characteristics. Id. at 930.¹ In LoCicero v. Day, supra, the court specifically rejected the petitioner's argument that the application of the guidelines was violative of the purpose of the U. S. A. and indicated that the guidelines should be applied thereunder.

"It is petitioner's claim that the Board violates his rights in that it has arbitrarily established periods of time for certain categories of offenses, which must be served prior to the youth offender being considered for any type of parole." Amended Petition, paragraph No. 1. Petitioner's argument is without merit for the reason that no suggestion of arbitrariness has been shown." Id. at 5.

Finally, this Court observes that on March 15, 1976, Title 18, U.S.C. §5017(a) was amended to provide for the conditional release of

This Court is cognizant that in Franklin v. United States Board of Parole, 383 F.Supp. 1151 (D. Col. 1974) while it was intimated that the use of guidelines as to Y.C.A. offenders was within the Board's discretion, the court nonetheless required the Board to furnish the defendants with explanations why decisions outside the guidelines were not warranted.

1

youth offenders in "accordance with the provisions of Section 4206 of this title." Title 18, U.S.C. §4206 as amended on March 15, 1976 states the general parole determination criteria as follows:

"§4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released."

The use of guidelines is thus consistent with the abovementioned statutory parole determination criteria.

VII.

In light of all of the abovementioned considerations, this Court must conclude that the Board of Parole was not precluded from considering offense severity in determining petitioner's eligibility

for continued confinement is not violative of the spirit and provisions of the Youth Corrections Act.

For these reasons, it is

ORDERED AND ADJUDGED that this Petition for Writ of Habeas Corpus be, and the same is hereby, DISMISSED.

DONE AND ORDERED at Miami, Florida, this 22 day of September, 1976.

181 C. Clyde Atkins
UNITED STATES DISTRICT JUDGE

cc: U. S. Attorney (MUSA Bates)

Mr. Robert Bryant McKay
Federal Correctional Institution
13801 S. W. 137th Avenue
Miami, Florida 33177

Z

FILED

1966-1-10
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GEORGE EARL WALTON,
Petitioner,
v.
EDWARD H. LEVI, et al.,
Respondents.

No. C-76-1806 WWS

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

7
18 Petitioner, who is confined at the Federal Youth
19 Center at Pleasanton, California, contends that the then
20 United States Board of Parole (now the United States Parole
21 Board) erroneously denied him parole. This Board has
22 exhausted his administrative remedies by appeal to the
23 National Appeals Board.
24
25 in denying petitioner parole, the Board erroneously took
26 into consideration the severity of the offense of which he
27 was convicted. Petitioner had been convicted of violating
28 21 U.S.C. Sec. 841(a)(1) and was sentenced under the
29 Federal Youth Corrections Act. After having been committed,
30 petitioner was granted a parole hearing in July 1975. By
31 order dated August 15, 1975, the Board denied parole, stating,
32 among other reasons

1 "Your offense behavior has been rated as very
2 high severity."

3 Petitioner argues that the Federal Youth Correc-
4 tions Act precludes consideration of the severity of the
5 offense in the making of parole decisions, relying princi-
6 pally on a statement found in Dorszynski v. United States,
7 418 U.S. 424, 434 (1974):

8 "An important element of the program was that
9 once a person was committed for treatment under
the Act, the execution of sentence was to fit
the person, not the crime for which he was con-
victed."

10 But Dorszynski does not address the question whether the
11 Board's guidelines, which among other things take into
12 account the severity of the offense, may be applied to
13 youth offenders. See, 28 C.F.R. Sec. 2.20. While some
14 decisions questioned the propriety of this practice in the
15 past^{1/}, Congress in 1976 removed whatever doubt there may
16 have existed by amendment of Title 18. Section 5017(a),
17 as amended, now states

19 "The Commission may at any time after
reasonable notice to the Director release con-
ditionally under supervision a committed youth
who has been committed to the custody of the
Commission."

21 vision he shall so report and recommend to the
Commission."

23 Section 4206(a) of Title 18, added by Public Law

25 Section 4206(a) of Title 18, added by Public Law
26 93-481, 100 Stat. 1799, provides that the Commission shall
27 determine the criteria as follows:

28 "If an eligible prisoner has substantially
obeyed the rules of the institution or insti-
tutions to which he has been confined, and if
the commission, upon consideration of the nature
and circumstances of the offense and the history

30
31 1/ United States ex rel. Mavet v. Sigler, 403 F.Supp. 1243
(M.D. Pa. 1975) (on appeal to the Third Circuit); Fletcher v.
32 Levi, C-75-2064 (D.D.C. Jan. 16, 1976). Contra, Barr v.
United States, 415 F.Supp. 990 (W.D. Okla. 1976).

and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

* * * pursuant to guidelines promulgated by the commission pursuant to section 4203(c)(1), such prisoner shall be released." (Emphasis added.)

From the foregoing, it is clear that the Board may now apply its guidelines, including consideration of the severity of the offense, in making parole determinations. The legislative history of the 1976 amendments reflects a broad remedial purpose to improve the parole decision making process. 1976 U.S. Code Congressional Service, pp. 583 et seq. H. Conf. Rep. 94-838. We see no reason why petitioner's parole should not be governed by the principles embodied in the 1976 amendments.

Accordingly, IT IS ORDERED that the motion for leave to proceed in forma pauperis be and it hereby is granted;

Dated: December 3, 1976.

1. 00. 1.50
United States District Judge